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ABSTRACT

These legal documents and discussions represent a variety of litigations concerning state statutes and federal regulations. Part A, "Preventing a Law Suit," offers suggestions for avoiding employee termination lawsuits and presents documents for teacher evaluation and for teacher termination and grievance hearings. "New and Emerging Issues in School Employment Law," part B, includes eight sections: (1) guidelines, complaint procedures, and court decisions affecting Title VII and sexual harrassment; (2) two reports about preventing First Amendment problems and about employee discipline; (3) federal and state handicap statutes' limitations on Acquired Immune Deficiency Syndrome (AIDS) policies; (4) implications of alcohol and drug abuse for the workplace; (5) significant court decisions concerning discipline of teachers for reasons of immorality; (6) enforcement of the state Public Employee Labor Relations Act; and (7) the status of part-time workers, or "employees at will." Part C, "The Trial," imparts methods for dealing with the Equal Employment Opportunity Commission and for trying a case involving the Age Discrimination in Employment Act. Rules for good witness behavior and for giving a deposition are offered, along with court documents generated during sex discrimination litigation. (CJH)

NSBA Council of School Attorneys

Presents

PREVENTING AND DEFENDING ACTIONS BY SCHOOL DISTRICT EMPLOYEES

AUGUST 1986

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FOREWORD

The National School Boards Association is pleased to welcome you to the Council of School Attorneys Seminar on **Preventing and Defending Actions By School District Employees.**

During the Seminar you will learn techniques on developing sound employment policies, evaluating teachers, working with the EEOC, representing the school district in dismissal hearings and in court and the latest word on cases relating to age discrimination, Section 1983, communicable diseases and much more.

We are proud of the seminar we are about to present to you and are committed to providing this type of service to you in the future. We are interested in your reaction to the seminar and welcome your comments at any time. We wish you an enjoyable and informative meeting.

A handwritten signature in cursive script, reading "George T. Register, Jr.".

George T. Register, Jr.
Chairman
NSBA Council of School Attorneys

A handwritten signature in cursive script, reading "August W. Steinhilber".

August W. Steinhilber
General Counsel and
Associate Executive Director



PREVENTING AND DEFENDING SUITS BY
SCHOOL DISTRICT EMPLOYEES

SEMINAR COURSEBOOK

This workbook was compiled to aid the practitioner in preventing and defending actions by school district employees. The materials are intended for use as reference and not as a panacea to meet the attorney's needs in every situation.

The workbook, like the seminar, is organized around the preventive practice and the preparation and trial of the lawsuit. In some instances only one document is included and in some situations several examples are offered.

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THE INFORMATION CONTAINED IN THIS BOOK IS
INTENDED FOR INSTRUCTIONAL USE ONLY, TO SERVE AS
A GUIDELINE TO SCHOOL ATTORNEYS IN THEIR HANDLING
OF SIMILAR ISSUES. NOTHING HEREIN SHOULD BE
RELIED UPON AS LEGAL ADVICE. ALL PLEADINGS,
MOTIONS, ETC. SHOULD BE DRAFTED BY THE SCHOOL
DISTRICT ATTORNEY TO MEET THE INDIVIDUAL NEEDS OF
THE ATTORNEY'S CLIENT.



PREVENTING AND DEFENDING ACTIONS BY SCHOOL DISTRICT EMPLOYEES

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A.1. POLICY DEVELOPMENT

OUTLINE ON CONSIDERATIONS IN DEVELOPING
EMPLOYMENT POLICIES

David R. Keller
Barley, Snyder, Cooper & Barber
Lancaster, PA

A.2

I. BASIC APPROACH

A. This material is geared primarily to nonunion, nonprofessional employee policies, but some material may apply in other contexts.

B. The Purposes of Policies

1. Clarity - First and foremost, policies are designed to clearly inform employees what is expected of them, and what they can expect of the employer.
2. Good Employee Relations (including Union Avoidance) - Just as an employer spends time and effort promoting its service to the public, it should promote the benefits and advantages of working for the employer. Employee manuals, particularly, should be positive documents, designed to make employees appreciate the advantages of working for the employer. They should also convey a sense of caring and concern about employees.
3. Protection from Legal Pitfalls - Identify potential legal challenges, whether in the courts or before administrative agencies, and draft policies with a view toward minimizing risks. But, this is just one of three purposes of an employee handbook and should be relegated to its proper position.

C. Balancing the Competing Purposes

Good employee relations and adequate legal protection are often difficult to reconcile. Writing good employee relations policies often means implying, or expressly stating, that employees will receive certain forms of fair treatment. This tends to weaken an employer's defense to an employment-at-will lawsuit. Similarly, writing a policy designed solely for legal defense - "there is no guarantee of fair treatment here" - is rather poor employee relations. Every employer must strike its own balance.

II. WHAT ARE THE PITFALLS?

A. Employment at Will

1. The Traditional American Rule

- a. "[A] corporation, or an individual, may discharge an employee with or without cause,

at pleasure, unless restrained by some contract. . ." Henry v. Pittsburgh & Lake Erie R.R., 139 Pa. 289, 297 (1891).

- b. "May I not refuse to trade with anyone? May I not forbid my family to trade with anyone? May I not dismiss my domestic servant for dealing or even visiting, when I forbid? And if my domestic, why not my farmhand, or my mechanic, or my teamster?" Payne v. Western & ATL. R.R., 81 Tenn. 507 (1884).
- c. Handbooks and policies traditionally viewed as unilateral gratuities, not bargained for, so not contractual, Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976), Richardson v. Charles Cole Memorial Hospital, 466 A.2d 1084 (1983), Gates v. Life of Montana Ins. Co., 638 P.2d 1063 (1982); Heideck v. Kent General Hospital, Inc., 446 A.2d 1095 (Del. 1982)

2. Judicial Erosion - The Implied-in-Fact Contract

- a. Courts in over 20 states, recognize, to some extent, actions for breach of an employment contract arising from employee manuals, or implied by other personnel policies, and/or oral or written representations regarding job security.
- b. Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3rd Cir. 1983) - 3rd Circuit receptivity to view that Pennsylvania law allows discharged employee to claim a contract based on "custom, practice or policy" of the employer.
- c. Examples of Cases Going to a Jury
 - 1. Promise of a job until retirement age so long as employee properly performs his duties. Eales v. Tanana Valley Medical-Surgical Group, Inc., 63 P.2d 958 (Alaska 1983)
 - 2. Terminate employees for "just cause only" Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579 (1980)

3. "Employees may be terminated for any reason during their probationary period." (implying no longer true after probation completed) Wiskotoni v. Michigan National Bank-West, 716 F.2d 378 (6th Cir. 1983)
3. Other Erosions of the Doctrine - Covenant of Good Faith and Fair Dealing; Public Policy; Wrongful Discharge
 - a. Covenant of good faith and fair dealing prohibits discharge motivated by "bad faith or malice or based on retaliation" Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974)
 - b. Public policy exception; a few examples: Geary v. U.S. Steel, 456 Pa. 171, 319 A.2d 174 (1974); Peterman v. Teamsters Local 396, 174 Cal. App.2d 184, 344 P.2d 25 (1959); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (1980); Frampton v. Central Ind. Gas Co., 260 Ind 249, 297 N.E. 425 (1973); Fortune v. National Cash Register 373 Mass. 96, 364 N.E. 2d 1251 (1977)
4. Particular Policies to Review with the At-Will Problem in Mind
 - a. Employment Application
 - b. Disclaimer
 - c. Leaves of Absence
 - d. Military Leave
 - e. Jury Duty
 - f. Workers' Compensation
 - g. Probationary Period
 - h. Attendance
 - i. Complaint or Grievance Procedure
 - j. Layoff and Recall
 - k. Performance Appraisals
 - l. Discipline and Discharge (Work Rules)
 - m. Employee Privacy/Search and Seizure
- B. Equal Employment Opportunity Pitfalls
 1. Generally speaking, the following policies must be written with a view toward potential problems under Title VII of the Civil Rights Act of 1964,

the Age Discrimination and Employment Act, and state human relations acts.

- a. Health Care Policies - Pregnancy Discrimination
- b. Disability Leaves of Absence - Handicap and Pregnancy Discrimination
- c. Personal Leave of Absence (childrearing) - Sex Discrimination
- d. Early Retirement Incentive Programs - Age Discrimination
- e. Promotions and Transfers - Race, Sex and Age Discrimination
- f. Performance Appraisals - Race, Sex and Age Discrimination
- g. Discipline and Discharge - All Forms of Discrimination
- h. Sexual Harassment Policy - Sex and Age Discrimination

III. SPECIFIC POLICIES

A. Typical Problems

1. The Employment Application

- a. The first contact an employee has with the employer is normally by way of a job application. This is where to begin structuring the employment relationship.
- b. Unless position applied for carries with it some property rights, application should have a prominent disclaimer stating that all employees are free to resign at any time and are subject to discharge at any time (with or without notice), and that a contrary arrangement can only be made in writing by an authorized official of the employer, or by the employer's board.
- c. No prohibited EEO inquiries.
- d. Age - "Over 18 or under 70" preferred unless there are specific reasons to ask the age of an applicant.
- e. Handicap inquiries limited to those which would hinder ability to do job applied for and accommodations which may be required.

2. The Handbook or Manual Disclaimer - Several Examples

- a. "The Employer regularly reviews the policies contained in this manual, and when possible attempts to improve and expand benefits and make changes which meet employees' needs.

By the same token, it may be necessary to modify or cancel certain of the personnel policies or benefits described here for reasons consistent with the needs of the organization. As personnel programs and policies change, this manual will also change.

None of the policies or benefits described in the manual are intended by reason of their publication to confer any special contractual rights or privileges upon specific individuals or to entitle any person to remain employed for any period of time.

Personnel policies and procedures occasionally require clarification. Further clarification of any personnel policies or procedures may be obtained from the personnel director.

Where a benefit plan, health or life insurance provision or statute is described in general terms, the complete and controlling description is the official and current plan document or statute."

- b. "An employee's employment and compensation may be terminated with or without cause and with or without notice at any time at the option of either the employer or the employee. No representative of the employer (other than _____) has authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to this paragraph.

This manual is not intended to constitute a contract of employment or a

guarantee of the benefits or policies stated in it. The employer may unilaterally revoke or revise this manual at any time for any reason."

see Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980)

- c. "Employment shall be 'at will' and shall be terminable 'at will' by the employer or employee with or without cause. Any oral statements or promises to the contrary are not binding upon the employer. Should such a statement be made, please confirm it with the Director of Personnel Services. The employer shall not be responsible for such statements that are not confirmed in writing. Because of the need to change policies to accommodate changes in our organization these policies and rules are subject to change without prior notice. This manual does not constitute a contract."

3. Leave of Absence Policies

a. Disability Leave

- 1. Provide a minimum of six weeks available leave (and check state laws) Abraham v. GAIU, 660 F.2d 811, 26 FEP Cases 818 (DC Cir. 1981)
- 2. Set maximum limits
- 3. Define job guarantees
- 4. Pregnancy, childbearing and related medical conditions treated like any other disability
- 5. Sample attached

b. Childrearing Leave

- 1. Offered on the same terms as other personal leaves
- 2. Offered without regard to sex

4. Workers Compensation Policy

- a. Although mandated by law, a policy may be helpful

- b. Affirm compliance with the law
 - c. Employment status consistent with disability leave of absence
- 5. Vacation Policies
 - a. Review for clarity
- 6. Jury Duty
 - a. Affirm support and compliance with the law
- 7. Equal Employment Opportunity Policy
 - a. Every handbook or policy manual must have one.
 - b. "The employer is an Equal Employment Opportunity employer. It is the policy of the employer to not discriminate against any employee or applicant for employment because of race, color, religion, age (40-70), sex, handicap, national origin, ancestry, physical disability or Veteran status. The employer promotes the principle of equal employment opportunity.

Accordingly, all recruiting, hiring and promoting for all job classifications is made without regard to race, color, religion, age (40-70), sex, handicap, national origin, ancestry, physical disability, or Veteran status, except where [age, sex or] type of handicap is a bona fide occupational qualification. The employer makes every effort to insure that all personnel actions, such as compensation, benefits, transfer, promotions, layoffs, rehires from layoffs, tuition assistance, educational programs, social recreational programs and use of employer facilities, will be administered without regard to race, color, religion, age (40-70), sex, handicap, national origin, ancestry, physical disability, or Veteran status, except where [age, sex or] type of handicap is a bona fide occupational qualification."

8. Sexual Harassment

- a. Have a policy - 29 c.f.r. §1604.11(f)
 "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."

- b. Sample Policy

"The employer has a policy against sexual harassment. It is illegal for any employee, male or female, to harass another employee by (a) making unwelcome sexual advances or requests for sexual favors, or engaging in other verbal or physical conduct of a sexual nature, or (b) making submission to or rejection of such conduct a basis for employment decisions affecting the employee, or (c) creating an intimidating, hostile or offensive working environment by such conduct. Any employee who believes that he or she has been subjected to sexual harassment should report the alleged act immediately to _____, and a confidential investigation of any complaint will be undertaken immediately. The question of whether a particular action or incident is prohibited behavior or a purely personal, social relationship without a discriminatory employment effect requires a determination based on all the available facts in the matter. Any supervisor, agent or other employee who is found after appropriate investigation to have engaged in sexual harassment of another employee will be subject to appropriate sanctions depending upon the circumstances, from a warning in his or her file up to and including immediate discharge."

9. Probationary Period
 - a. Make it sufficiently long
 - b. No express or implied employment guarantees following successful completion of probationary period
 - c. Sample attached
10. Employee Status
 - a. Avoid use of the word "permanent" in referring to employment.
 - b. Sample attached
11. Complaint or Grievance Procedure
 - a. Broad definition of grievance
 - b. No time limits on employees
 - c. Indicate employer support for right to file grievance
 - d. Provide at least one alternative method
 - e. Sample attached
12. Promotion Policy
 - a. Job posting or bidding
 - b. Interview process
 - c. Notification to employees of reasons for nonselection and what will be required to obtain future promotions
 - d. Sample attached
13. Performance Appraisals
 - a. Use of objective factors where possible
 - b. Avoid the terms "attitude" and "loyalty"
14. Discipline and Discharge
 - a. The benefit of a thorough listing of prohibited offenses - gives employees and government agencies or courts clear guidelines as to what is expected by a particular organization.
 - b. Some flexibility in immediate discharge situations - certain offenses are grounds for discipline "up to and including immediate discharge".

- c. A catchall phrase - discharge may occur for "any other conduct which is of a serious nature and which, in the sole opinion of the employer, makes the employee unfit for further service or warrants discharge."
- d. Terms to avoid:
 - 1. Just cause
 - 2. Cause
 - 3. Good and sufficient cause
 - 4. Reasonable cause
- e. Sample attached

EMPLOYEE HANDBOOKS/MANUALS

A Checklist of Possibilities

I. INTRODUCTION

- A. Welcome
- B. Organization's Purpose and Structure

II. EMPLOYEE BENEFITS

- A. Health Care
- B. Accident and Disability Income Protection
- C. Life Insurance
- D. Leaves of Absence (with or without pay)
 - 1. Sick Leave
 - 2. Extended disability leave
 - 3. Funeral leave
 - 4. Jury duty
 - 5. Military leave
 - 6. Personal or emergency leave
- E. Unemployment Compensation
- F. Workers' Compensation
- G. Vacation
- H. Holidays
- I. Pensions
- J. Blood Bank and Donor Program
- K. Savings and Investment Programs
- L. Service Awards
- M. Tuition Assistance and Training Programs
- N. Extras
 - 1. Sports and other recreation
 - 2. Outings
 - 3. Employee picnics
 - 4. Meals, beverages, parking and other privileges

III. PERSONNEL POLICIES AND PRACTICES

- A. EEO Policy Statement including Sexual Harrassment Policy
- B. Nature of Employment
 - 1. Probation period
 - 2. Seniority considerations
 - 3. "At will" disclaimer

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- C. Wage and Salary Program
 - 1. Hourly or salaried
 - 2. Periodic and merit increases
 - 3. Payroll deductions
- D. Hours of Work
 - 1. Overtime policy and practices
 - 2. Outside employment prohibitions
 - 3. Scheduling procedures
- E. Attendance
 - 1. Absenteeism and lateness policy
 - 2. Call-in policy
 - 3. Emergency closing information
 - 4. Reporting pay
- F. Time Cards, Clocks and Sheets
- G. Pay Days and Procedures
- H. Complaint and Grievance Procedure
 - 1. Progressive steps
 - 2. Final authority
- I. Communications
 - 1. "Open door" policy
 - 2. Newsletters, bulletins, etc.
 - 3. Bulletin boards
- J. Personal Business
 - 1. Use of telephone
 - 2. Automobiles
 - 3. Other activities
 - 4. Visitors
- K. No Solicitation/Distribution Rules
- L. Rest and Meal Periods
- M. Suggestion Program
- N. Promotions and Transfers

1. Job posting policy
 2. Ability and seniority considerations
- O. Layoff and Recall
- P. Performance Appraisal Program
- Q. Safety and First Aid
1. Safety clothing and equipment
 2. Safety practices
 3. First aid stations
- R. Uniforms, Identification Badges, etc.
- S. Lockers
- T. Contents of Personnel Records
- U. Access to Personnel Records
- V. Resignations
1. Preferred prior notice period
 2. Exit procedures and interviews
- W. Discipline and Discharge
1. Work rules
 2. Progressive discipline vs. immediate discharge

10 COMMANDMENTS FOR AVOIDING LAWSUITS
OVER EMPLOYEE TERMINATION

1. Review all written company policies and documents relating to termination or layoff to assure that they avoid conveying any impression that the employer guarantees long term or permanent employment.
2. Clearly define standards of conduct and make them reasonable and attainable.
3. Generate "favorable documents" wherever possible. Put disclaimers on applications and manuals. Make notes about hiring, exit and disciplinary interviews, or conversations about benefits. Where appropriate, have employees sign the documents indicating that they have received and understand the information.
4. Conduct performance evaluations and be completely candid in appraisal of employees.
5. Have a progressive discipline procedure that demonstrates employer fairness to employees before a discharge takes place.
6. Appoint someone who does not directly supervise the employees to objectively and carefully review every termination.
7. Be certain all of the factors relevant to a termination are reviewed before the employee is fired. These include the employee's age, the strength of the employer's evidence, the consistency of the application of policies and whether the employee has had the opportunity to tell his or her side of the story.
8. State the reasons for the discharge candidly, being careful to avoid untrue and defamatory statements.
9. Conduct the discharge with sensitivity. Dignity and confidentiality are important.

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10. If the discharge is seriously disputed, explore possibilities of avoiding litigation by resolving the matter amicably.

Paraphrased from speech of Lloyd Loomis
Senior Counsel for Employee Relations,
Atlantic Richfield Company Reporter in
Daily Labor Report
5/16/85 at p. A-1.

SUGGESTIONS FOR POLICY DEVELOPMENT AND
SAMPLE POLICIES

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A.18

SAMPLE MEDICAL LEAVE OF ABSENCE POLICY

All employees are eligible for a leave of absence for medical reasons upon a showing by the employee that he or she is temporarily disabled and unable to perform the essential functions of a job which is available. Such leave of absence will be granted without regard to the reasons for the disability, or whether the disability is work related or non-work related.

The maximum length of a medical leave of absence is determined by the employee's number of years of continuous service at the time the leave begins. Although extensions are available for limited periods of time, the employer reserves the right to grant or deny an extension, at the discretion of the Board. Normally, the factors considered in granting an extension will be the employee's length of service, likelihood of medical recovery, likelihood of an available job at the expiration of extension, and the employee's work record. The scale for determining maximum leaves of absence is as follows:

<u>Employee's Length of Service</u>	<u>Maximum Medical Leave</u>	<u>Maximum Extension</u>
Less than one year	3 months	1 month
One year to three years	6 months	3 months
Three years to seven years	1 year	6 months
Over seven years	2 years	1 year

Employees who are unable to return to work following a leave of absence or any extension thereof will be terminated. In the event that a terminated employee recovers from the disability and is again able to work, the employer will consider the employee for rehire based on the needs of the organization and the employee's work record during employment.

Leaves of absence for medical reasons will be without pay or benefits except where employees are eligible for short term disability benefits under the disability policy and except for medical insurance and life insurance which are maintained for employees on medical leave of absence for the first three months of the leave. Should employees

desire medical or life insurance coverage after the first three months of the leave, they must pay for the coverage. Employees on workers compensation who are eligible for short term disability payments will receive the difference, if any, between the amount payable under the short term disability policy and the amount received through workers' compensation on a weekly basis.

Medical leaves of absence are not considered a break in service for determining amount of vacation eligibility or length of continuous service with the employer. However, employees do not accrue or receive benefits such as vacation, holidays and sick leave during a medical leave of absence.

Employees who return to work within three months of the commencement of the leave of absence are generally entitled to be returned to their former job. In rare cases where it is necessary to fill an employee's job during the first three months of a leave of absence, the employee will be so informed and the employee will be guaranteed a job of similar status and pay. If the leave of absence extends beyond three months, every effort will be made to return the employee to a job of similar status and pay, but in some cases this may not be possible.

No leave of absence will be granted or extended unless medical verification of the need for a leave of absence acceptable to the employer is presented. The employer reserves the right to require employees to be examined by a physician of its choice as a condition for approval of leave of absence, at any time during a leave of absence, and at the time the employee seeks to return to work. Employees who fail to properly follow designated procedures for obtaining or verifying a leave of absence, who provide false or misleading information, or who refuse to be examined by a physician designated by the employer are subject to a disciplinary action up to and including dismissal.

PROBATIONARY PERIOD POLICIES

The probationary period is extremely important, but may also cause an employer a great deal of trouble. Government agencies and courts will often give employment decisions

greater deference if an employee is terminated during the probationary period than if the termination occurs thereafter. For that reason, the probationary period should be long enough to ensure that employer can accurately evaluate employees.

There are a number of ways to write the language of the probationary period to protect the employer. It may be defined in terms of months, which is easy for recordkeeping purposes. It may also be described in terms of days, working days, or "days actually worked". Each one has a different meaning. If you indicate that an employee's probationary period is "90 days of work", the employee cannot complete the probationary period until he or she has actually worked 90 days. Absences, holidays, etc. do not count.

Employees should not be permitted to complete a probationary period without having worked enough time to be evaluated, and the policy should perhaps provide for extensions of the probationary period in cases of absenteeism or other circumstances where a thorough review has not been possible.

A number of commentators have suggested elimination of probationary periods because they may damage the employer's position in the employment at will context. If a policy states that a probationary employee may be fired for any

reason at any time, does that not suggest that when someone completes the probationary period they may no longer be fired for any reason? Yartzoff v. Democrat-Herald Publishing Co. 281 Or. 651, 576 P.2d 356 (1978); Wiskotoni v. Michigan National Bank - West, 716 F.2d 378 (6th Cir. 1983). Not if the probationary period language contains a disclaimer which makes it clear that employees remain employed on an "at will" basis even after the probationary period expires. Samples:

1. The probationary period is the time when both the employee and the employer critically evaluate one another to see if the employment needs of each can be mutually satisfied. During this time period new employees are constantly and carefully being evaluated and employees should similarly evaluating the organization to decide whether or not they wish to continue their employment. Only through this type of self analysis can both parties determine their compatibility.

The employer believes that this is the beginning step in creating a working environment where employees can not only develop their skills but also enjoy working together.

All new employees are on a probationary or trial basis during their first six months of employment. Employees are given every opportunity to learn their new job. New employees are not only expected to demonstrate their best ability and cooperation, but they are also expected to have excellent attendance and to meet all job requirements. Employees who fulfill these requirements will successfully complete their probationary period. The employer may extend the probationary period beyond six months where an employee has been absent for a period of time or where other circumstances warrant.

Unfortunately, employees who violate rules or standards of the organization or who it appears cannot perform at a satisfactory level will be subject to termination during this probationary period.

During this probationary period employees may terminate their employment for cause or no cause at any time, and the employer reserves the same right.

Even after the probationary period, employment continues to be governed by this "employment at will" principle and no specific period of employment is guaranteed.

2. The probationary period for full time employees is 90 calendar days, and for part time employees is six months. The probationary period will be extended by adding the number of absent days to the required time.

The probationary period is the time for employees to demonstrate the willingness and ability to do the job. No notice of termination need be given, either by the employee or the employer during this time.

Continuance of employment after satisfactory completion of a new employee's probationary period should in no way be interpreted to mean that the employer has contracted to offer the employee a lifetime or otherwise specified term position. It is intended to suggest that only an employee who performs satisfactorily during this period has met the minimum performance expectations set by his or her supervisor and department. The employee will continue to receive periodic performance evaluations as outlined by his or her supervisor and/or department head. The employer still maintains the right to terminate any employee at any time.

EMPLOYEE STATUS POLICY

Where an employer wishes to define employee categories for various reasons, such as the offering of different benefits to different employee groups, it is most important to avoid inadvertently offering permanency or long term employment as part of the policy. Avoid such terms as "permanent employee", "career position", or any reference to "tenure" unless indeed some form of official tenure is

available to the employee. A very basic sample is as follows:

The employer has three employee categories, "regular full time", "regular part time" and "temporary".

A regular full time employee is one who is scheduled to work at least 37.5 hours per week on a regular basis.

A regular part time employee is one who is scheduled to work less than 37.5 hours per week on a regular basis.

A temporary employee is hired for a specified period of time not to exceed three months.

For payroll purposes, employees are also classified as exempt or non-exempt. Exempt employees are paid on a salaried basis and are employed in job classifications which are exempt from the overtime pay provisions of the Fair Labor Standards Act.

Nonexempt employees are paid on an hourly basis and receive compensatory time or are paid for overtime at the rate of time and one half for all hours worked in excess of 40 hours per week under the provisions of the FLSA.

COMPLAINT OR GRIEVANCE PROCEDURES

Unionized employees generally have a contractual grievance procedure available to them. Sound employee relations demands that nonunion employees also have a right to bring gripes and complaints forward to the employer. A successful grievance procedure provides a peaceful way of handling disputes, contributes to harmonious employee relations, and helps the employer identify and eliminate causes

of dissatisfaction.

A grievance policy should emphasize employer support for the idea that employees have the right to file grievances. The policy should not define a grievance too narrowly. The nonunion grievance procedure should be quite different than a typical grievance procedure in a union contract. The union grievance procedure will often have a narrow definition of a grievance and very strict time deadlines which will cause the grievance to be abandoned or waived if the deadlines are missed. By contrast, nonunion employees should be able to bring forward any gripe they have, and an employer has no reason to reject nonunion employee complaints on procedural grounds. If there are any time deadlines, put them on the employer, not on the employee.

The policy should ordinarily direct employees to progressively higher levels of the organization, beginning with the first level supervisor. Be careful, however, not to make the first level supervisor the only initial source of help. What is an employee to do if she is being sexually harassed by her first level supervisor and the grievance procedure unambiguously states that she must take a grievance in the first instance only to the supervisor? In unusual cases where the employee cannot or will not discuss the matter with the first level supervisor initially, pro-

vide an option. It may be that the option will be a person who can evaluate the problem and simply decide where to send the employee. That person may send the employee back to the first level supervisor and insist on discussion there, or may agree that the employee should begin the grievance process at a higher level.

Who should be the final authority in a grievance procedure? Where possible, employees should be able to take grievances to the very highest levels - the president of a corporation or the board in the case of a school district or non-profit corporation. Obviously, that is not always possible. It may be that a personnel director is the only practical solution in some organizations, depending on size and structure.

Below are some sample grievance procedures:

1. The employer and employees benefit from an open exchange of opinions. Grievances should be resolved, if possible, through free and frank discussion.

- a. An employee is expected to consult first with his or her direct supervisor regarding any action, occurrence or attitude either expressed or implied which is perceived as unfair or inequitable, or concerning a deviation from adopted policies. If a satisfactory resolution cannot be achieved through regular supervisory channels, the employee may appeal to the personnel director. In unusual cases where the employee believes that the matter cannot be resolved with the supervisor, it may be first discussed with the personnel director.

- b. If the personnel director cannot resolve the matter to the employee's satisfaction within 10 working days after the matter is discussed, the employee may request a meeting with the superintendent. The superintendent may

investigate the matter and will report back to the grievant the action to be taken or the reason for taking no action.

2. Each employee of the district has the right to express his or her views concerning the district's adherence to its policies and its employment practices. Should an employee have a disagreement with a district policy or practice, or any other complaint about the employment context, the employee has the right to communicate that complaint to the administration and the board.

The first step in making a complaint is for the employee to discuss the problem with his or her immediate supervisor.

If the matter cannot be resolved between the employee and the immediate supervisor, or if the problem concerns the employee's immediate supervisor, the employee may bring the complaint to the Director of Personnel Services. The Director of Personnel Services will discuss the matter with the employee, and if necessary with the supervisor, and will attempt to resolve the complaint.

If the Director of Personnel Services cannot resolve the complaint, the employee may present the complaint in writing to the Superintendent. Within ten days of the presentation of a written complaint to the Superintendent, the Superintendent shall conduct whatever investigation is deemed necessary and provide the employee with a written response.

Provided that a resolution of the problem or complaint has first been sought through the normal administrative channels with the supervisor, Director of Personnel Services and Superintendent, employees, individually or in groups, may present complaints to the Board. The Board will consider such complaints or problems at its regular committee meetings. Requests to be placed on the agenda of a committee meeting shall be made, in writing, detailing the problem, including requested solutions, to the Superintendent no less than seven (7) calendar days prior to such meeting. Following the meeting, the Board will provide a written response to the employee or employees bringing the complaint or problem to the attention of the Board.

PROMOTION AND TRANSFER POLICIES

Promotion of employees into higher level jobs should not be a mysterious process. When a job is vacated and one employee simply appears a few weeks later as the new incumbent, there will usually be several disgruntled employees who believe they could have qualified for the job. A good promotion policy contains procedures to notify employees when a vacancy occurs, to permit employees to express their interest, and to make employees feel that a fair procedure was used. It is usually wise to notify employees who have not been selected for the job of the reasons for nonselection and the steps they may take to improve the likelihood that they may receive a future promotion.

Transfer opportunities will vary greatly from employer to employer, but if there may be a need to involuntarily transfer employees on occasion, the employer should indicate the circumstances under which such transfers will be made. The employer may also have a policy permitting employees to request transfers and procedures for considering such requests.

Sample:

1. The purpose of the job posting policy is to encourage the growth and the advancement of employees, and to provide increased opportunities for the greatest number of employees.

- a. All non-professional openings will be posted. If there is a qualified candidate within the hiring depart-

ment, job posting outside the department will be at the discretion of the supervisor.

b. All eligible positions will be posted by the personnel department by placing notices on designated bulletin boards.

c. The job notice will include the job title, department, hiring supervisor, and description of duties and qualifications of the job. The notice also contains the date of the posting and the date to be removed from the bulletin board.

d. The position will be posted for five (5) working days. Employees submitting applications during the five day posting period will be considered before outside applicants. A position may be posted a second time if it remains unfilled.

e. Any interested employee should complete an application form and give it to the supervisor, who will forward the form to the hiring supervisor. The employer reserves the right to determine who will be interviewed and hired. Positions will be filled with qualified personnel only.

f. Job posting applicants will be evaluated on the following:

1. Current performance
2. Qualifications for a new position
3. Attendance
4. Length of service with the employer

g. All applicants interviewed, but not selected, will be notified by the hiring supervisor, in writing, that the position has been filled. When appropriate, the current supervisor should review the reason for not being selected. This review process will be constructive in that it will suggest ways to prepare for future opportunities.

h. Any employee who has been employed at least six months will be eligible to apply for a position through job posting.

DISCIPLINE AND DISCHARGE POLICIES

One certainty of our modern age is that eventually if you discharge employees you will be challenged. In the case of public employees there may be property rights or specific designated limitations on the right of the employer to discharge. In such cases, policies must be drafted with the law in mind. Where employees, public or private, have no such rights, challenges may occur through government discrimination agencies, or may take the form of an employment at will lawsuit. A discipline and discharge policy should be fair and consistent, but one that also provides the flexibility to deal with the individual facts of a case.

In reviewing discipline, government agencies will attempt to demand consistency. They will carefully review policies and determine whether an employee can expect to be discharged for certain types of misconduct under the policies. All in all, it is very difficult to write a good disciplinary policy that will serve every purpose. Because government agencies are very much influenced by the written word, I believe it is preferable for most employers to write a long list of rules, the violation of which will lead to either progressive discipline or dismissal. Because no employer can possibly envision all of the ways in which

employees could engage in misconduct, any list of rules should include a "catchall" covering other misconduct which cannot be predicted.

Some employers object to a long list of work rules. The argument most often heard is that a long list of rules provokes discontent among employees. Good employees, however, expect that there will be rules that must be adhered to and they expect that those rules will be enforced against offenders. Where the employer strenuously objects to a listing of offenses, the best policy may simply be: "The employer reserves the right to discipline or discharge employees when, in the employer's opinion, their work is unsatisfactory or they have engaged in any form of misconduct."

In view of the status of employment at will litigation, avoid words which are likely to give employees a better argument that contractual employment guarantees have been made. Such terms as "just cause", "good and sufficient cause", or simply "cause" will lead to trouble. Instead, be sure to indicate in such policies that the employer decides what conduct warrants discipline or discharge.

Obviously, not every employer has the same needs in a discipline and discharge policy, and the one below is only a possible format to be used for non-professional, hourly employees. It does not contain specified progressive

discipline steps. The reason for omitting such steps is to avoid a lawsuit based on the employer's failure to follow the letter of its discipline procedures. If formal progressive steps are included in a policy, they must be followed.

The sole intent of discipline is to correct unacceptable behavior in order to maintain a working environment that everyone can enjoy. When violations occur it becomes necessary to consider the facts and circumstances of the individual case, the employee's length of service and record to determine what discipline is warranted.

This published list of violations and their penalties is clearly outlined to prevent any misunderstanding. The rules and regulations covering attendance, absenteeism, and tardiness are discussed elsewhere.

Disciplinary Rules

1. The following is a partial list of the kind of improper conduct which, when engaged in, shall constitute grounds for disciplinary action, up to and including immediate discharge:
 - a. Dishonesty, including any falsification or misrepresentation, providing incomplete, misleading or incorrect information in connection with the preparation of any records, including an application for employment;
 - b. Stealing or sabotage of equipment, tools and/or other property belonging to the employer or any other person;
 - c. Removal from the employer's premises of any of the employer's property or the property of others;
 - d. Willful damage, abuse or destruction of the employer's property or the property of others;
 - e. Absence from work for three (3) consecutive days without authorization or excuse acceptable to the employer;
 - f. Possession, sale or use of intoxicating beverages or drugs on the employer's property or reporting for work under the influence of intoxicating beverages or drugs;

g. Unauthorized use, possession, conveyance or storage of any firearms, explosives or other dangerous weapons on the employer's premises.

h. Insubordination (refusal to carry out instructions of a supervisor);

i. The use of profane, abusive or threatening language;

j. Fighting, coercing, interfering with or threatening bodily injury to any person;

k. Gambling of any kind, including but not limited to bookmaking or numbers writing;

l. Any act which might endanger the safety or life of others;

m. Failure to report to work upon expiration of a vacation, holiday, or leave of absence or upon being called back after a layoff;

n. Disclosure of confidential information to unauthorized persons;

o. Any other conduct which is of a serious nature and which, in the sole opinion of the employer, makes the employee unfit for further service or warrants discharge.

2. The following is a partial list of improper conduct which, when engaged in, will constitute grounds for the issuance of a warning before more severe disciplinary action is taken up to and including discharge.

a. Engaging in horseplay;

b. Carelessness or recklessness causing damage to, defacement or destruction of building, equipment or other employer property or the property of others;

c. Smoking in restricted areas;

d. Unsatisfactory work performance;

e. Excessive tardiness or absenteeism;

f. Posting, writing on or defacing bulletin boards, walls, equipment or other material or altering or removing notices therefrom;

g. Leaving regularly assigned work location without notifying the immediate supervisor;

h. Creating or contributing to unsanitary or unsafe conditions;

i. Sleeping, loafing or other abuse of time during assigned working hours;

j. Interfering with any employee's performance of duties by causing distractions;

k. Performing unauthorized personal work on employer time;

l. Any other conduct which, in the sole opinion of the employer, violates the standards it may reasonably expect from employees; and

m. Violation of two (2) or more of the above stated disciplinary rules during any twelve (12) month period of time may result in immediate discharge.

INSTRUCTIONS TO SUPERVISORS ON GRIEVANCE HANDLING

1. Plan the Setting and the First Interview

- Be accessible and listen to the employee's complaint in private - be patient, friendly and open-minded
- Show sincere interest and let the employee tell his or her own story from beginning to end, without interrupting. Encourage the person to talk. "Talking out" a complaint often provides a release for emotional high pressure. Tactful questions often help.
- If the employee is excited and emotionally upset, do not respond to this state. Don't get mad: this is particularly difficult if the supervisor is personally involved in the employee's gripe. Be calm and friendly - discuss, don't argue.
- Treat real and imaginary grievances in the same manner. A sincere complaint should not be considered lightly. Give the employee the benefit of the doubt.
- Be sympathetic and try to understand the employee's problem. Get at the real grievance. Do not overlook the possibility of a concealed problem. Take good notes.
- Avoid hasty decisions. Tell the employee when he or she can expect to hear from you again.
- Be willing to admit mistakes.

2. Get all the Facts Straight

- Get the facts and the whole story from all pertinent sources
- Contact all employees involved. Ask questions. Check the conditions and circumstances described by the employee. Investigate the story.
- Review the employer's policy and past practice in similar situations.

- Review the employee's record.
- Also get opinions and feelings.

3. Know Who Has Jurisdiction

If the complaint involves a situation or condition beyond the scope of your authority, don't make a decision on it. Instead, refer the grievance to your own supervisor, along with a description of the facts you have collected. Advise the employee when this course is necessary.

4. Consult Other Key Supervisors

Consult with specialists who may assist you. Don't shortcut anyone. Discuss the grievance with the next higher level of supervision and with a personnel specialist. Seek their advice and counsel.

5. Analyze the Facts and Make a Decision

- Fit the facts together. Weigh the facts and list the possible solutions.
- Don't jump to conclusions.
- Decide on the best possible course of action. Arrive at a decision and be sure of its wisdom.

6. Tell the Employee - Act Promptly and Fairly

- Plan what you are going to say.
- Give the employee the whole story.
- Explain why and how the decision was reached, and convince the person that it is a fair solution.

If you or the employer is wrong, admit it. Tell the employee what is going to be done about it. If the employee's complaint is unfounded, explain it tactfully. List all the reasons why. Help the individual save face. Don't use your authority to force an employee to accept the decision.

- Take the action promised to correct the cause of the complaint, making the desirable or practical changes as quickly as possible.

- If the employee is not fully satisfied with your decision, explain that the complaint may be taken to the next higher step, in accordance with the established grievance procedure.

7. Follow-Up

- Abide by the decision - live up to it
- Check the results of the decision.
- Be sure that the employee is satisfied and that his or her work attitude and relationship with other employees so indicate.
- Verify that whatever was agreed to was done.

Summed up, the supervisor's success in handling grievances depends not only on how well the techniques of successful interviewing have been learned, but also on how effective the supervisor is in using them. Proper handling of grievances is of the utmost importance to any employer because accumulation of little irritations and aggravations can result in a larger problem if neglected.

SUPERVISORY TRAINING - RECOMMENDED PROCEDURES FOR HANDLING DISCIPLINE

Part I

Checklist for Handling Discipline

I. Tools for the Job

1. Have a copy of the Policies, Employee Manual or Disciplinary Rules.
2. Read and understand the Policies and Rules.
3. Learn to be a good listener (requires attentiveness, patience and sincerity).
4. Be prepared to follow the letter and spirit of the Handbook and Rules.
5. Be prepared to be objective at all times (never play favorites; be firm but fair).

II. Management Responsibility

1. Recognize that discipline is, first and foremost, a management responsibility.
2. Remember that the purpose of discipline is to correct poor attitude and/or improper conduct and to compel compliance with reasonable rules and regulations.

III. Keeping Records

1. Each supervisor should have access to pen and paper at his desk and be able to secure same under lock and key.
2. Supervisors should have readily available the names and addresses of all personnel under their jurisdiction. This information should include the employee's date of hire, present job classification and prior work record (promotion history, etc.)
3. Supervisors should implement a formalized warning procedure which, at a minimum, encompasses recording the date, name of the employee and a brief outline regarding the occasion for a warning and/or disciplinary action (specify improper conduct, absenteeism, tardiness, etc.)
4. Final warnings should be carefully communicated to the employee in order to avoid misunderstandings. It is best to have another supervisor present at such a session in order to verify the conversation should it become necessary. A written record of the session is, of course, mandatory.

IV. Handling Discipline

1. Supervisors should, first of all, avoid over-reacting to immediate situations or circumstances. It is always better to suspend, pending investigation, rather than discharge an employee for what appears to be serious misconduct. This enables you to determine all of the facts. It also permits hot tempers to cool and gives the reasoning

process a chance to fully operate. (In cases of public employees with property rights in their job, no suspension without pay should take place until the employee has been told of the reasons for proposed discipline and given a meaningful opportunity to respond. Suspensions with pay should be considered in serious situations until the employer can schedule such a procedure.)

2. Supervisors should initiate an investigation into all of the facts. Confront all known and potential witnesses, review all records and examine all of the circumstances.
3. Discharge is reserved for only two situations:
 - (1) Offenses so serious as to render warning futile (physical assault, theft and violations of similar disciplinary rules).
 - (2) As the final step for repeat offenders (almost always based upon the available written records and after there has been progressive discipline).

Part II

Steps to be taken in Preparing for Discharge
(Every step should be painstakingly checked)

I. Rules, Regulations and Orders

1. Are the rules and regulations known by all employees?
2. By what method was this employee informed of such standing rules and regulations and/or how was a direct order communicated to him or her?
3. Are the rules and regulations and/or orders reasonable in this situation and are they job-related?

II. Enforcement

1. How have other employees been treated under similar circumstances (in your department and in other departments)?
2. Are records of such treatment available? Have they been consulted to insure uniform application of rules and the facts of the case at hand?

III. Warnings

1. Has this employee been warned of the specific violation in question in the past?
2. Has this employee received a final warning regarding this violation and/or other violations(s)?
3. Have these warnings been recorded and considered by the supervisor prior to a decision to impose the discharge penalty?

IV. Investigation

1. Have all of the facts been carefully gathered prior to making the decision to discharge the employee in question (the

employee's knowledge of the violation, how the employee came to know of the rule or order, the details, the actual violation or improper conduct, consultation with all witnesses and all other relevant factors)?

2. Remember that in some cases an employer may be required to accommodate an employee's request for representation (fellow employee) if the employee reasonably believes the interview may result in discipline.

Part III

Written Record and Documentation

I. Reasonableness of the Penalty

Is the penalty reasonable related to:

1. The nature and seriousness of the offense?
2. The individual employee's past record?
3. The employee's length of service with the employer?
4. Past practice of the employer regarding this specific rule and its violation by others?
5. All of the surrounding circumstances of this particular case? and, most important,
6. Can all of the above be readily established by available evidence or corroborated by testimony of responsible person(s) in the event the discipline is challenged by an outside agency?

LABOR RELATIONS AUDIT
A CHECKLIST

I. HIRING AND RECRUITING

1. What referral sources are used:

_____ State Employment Office	_____ Want-ads
_____ Ceta - OJT Funded Agencies	_____ Employee
_____ Word of mouth - walk-ins	_____ Other
	(specify)

2. Are past employment references checked? Yes

No

If yes, how? Phone Mail Other (specify)

3. Are reference checks documented? Yes No

If yes, by what method? Letter Form

Other (specify)

4. Does the employer have a written employment policy regarding nondiscrimination, affirmative action, and handicap accommodation?

YES NO

5. If the employer makes recruitment and advertising efforts, are they non-discriminatory and do they include EEO statements?

6. Is the employer's application form nondiscriminatory as regards age, sex, marital status, religion and veterans status?

7. Is background information (prior work history, education, conviction history, special skills, that is requested on the application or in an interview relevant to the particular job applied for?

8. Does the application form contain a "contract" disclaimer?

- | | YES | NO |
|--|-------|-------|
| 9. Does the application form hold the employer harmless for investigating the applicant's responses? | _____ | _____ |
| 10. Is the applicant required to submit to a medical examination? | _____ | _____ |
| 11. Are required tests relevant to the job applied for? | _____ | _____ |
| 12. Are lie detectors excluded from the application process? | _____ | _____ |
| 13. Does the employer have written guidelines for interviewers relative to permissible areas of questioning? | _____ | _____ |
| 14. Does a general review of all forms used in the hiring process reveal those forms to be appropriate? | _____ | _____ |
| 15. Does the employer maintain a dual information system so as to document applicant characteristics for EEO purposes? | _____ | _____ |

Comments:

II. ORIENTATION

- | | YES | NO |
|--|-------|-------|
| 1. After hiring, is the new employee provided with an orientation program? | _____ | _____ |
| 2. If so, please check (x) which of the following are discussed and by whom. | _____ | _____ |

Responsibility

	Personnel	Office/ Clerical	Immediate Supervisor	Co-Worker
_____ Hours/days of work _____				
_____ Rate of pay _____				
_____ Pay day _____				
_____ W-4 form _____				
_____ Time card/ sign in procedure _____				
_____ Payroll procedures _____				
_____ Overtime _____				
_____ Pay pro- gression _____				
_____ Probationary period _____				
_____ Performance reviews _____				
_____ Promotional opportunities _____				
_____ Benefits available _____				

Responsibility

	Personnel	Office/ Clerical	Immediate Supervisor	Co-Worker
Benefit eligibility				
Benefit enrollment				
Sickness/ absenteeism				
Phone numbers				
Identification card				
Parking				
Bathrooms				
Lockers				
Uniform				
Supervisor				
Specific work assignments				
Tour of work place				
Sanitation/ housekeeping				
Others (specify)				

- | | YES | NO |
|--|-------|-------|
| 3. Is the employee given any handbooks, manuals, policies? | _____ | _____ |
| 4. If so, does the employee sign for them? | _____ | _____ |
| 5. Is there a tour of facility? | _____ | _____ |

III. EMPLOYEE RECORDS

	YES	NO
1. Are employee records kept in a secure area?	_____	_____
2. Is access to employer records restricted?	_____	_____
3. Is an appropriate person designated as responsible for employer records?	_____	_____
4. Are there procedures for employee access to records?	_____	_____
5. Which of the following records are regularly used? (place an x if used)	_____	_____
_____ Application for Employment	_____	Record of Employee Conference/Discipline
_____ Reference Checks	_____	New Employee Checklist
_____ Attendance Record	_____	Benefit Enrollment Cards
_____ Payroll Evaluations	_____	Signed Disciplinary Rules
_____ Performance Evaluations	_____	Exit Interviews
_____ Training Record	_____	Other (specify) _____
6. How long are employee records kept?		
Comments:		

IV. EQUAL EMPLOYMENT OPPORTUNITY POLICIES

- | | YES | NO |
|--|-------|-------|
| 1. Does the employer have a specific individual designated as the equal employment opportunity officer? | _____ | _____ |
| 2. Does the employer have an EEO policy statement which covers all suspect categories, including handicapped, age, race, religion, nationality, and sexual harassment? | _____ | _____ |
| 3. Does the employer have an obligation to file an EEO-1 and has it been filed? | _____ | _____ |
| 4. If there is an affirmative action obligation, are the requisite elements, i.e., work force analysis, utilization analysis, goals/timetables, present? | _____ | _____ |
| 5. Does the employer maintain the proper EEO records? | _____ | _____ |
| _____ EEO-1 Report must be kept for two years as well as documents required to complete it. | | |
| _____ Dismissal records must be kept for at least one year. | | |
| 6. Does the employer comply with veteran re-employment laws? | _____ | _____ |

Comments:

V. COMMUNICATIONS

	YES	NO
A. Employee Meetings		
1) Are employee meetings held?	_____	_____
How often _____		
2) What topics are generally discussed at employee meetings?		

3) Do these meetings allow for questions from employees?	_____	_____
B. Bulletin Boards/Publications		
1) Are there Bulletin Boards?	_____	_____
2) For the employer's use only?	_____	_____
3) Is the material current?	_____	_____
4) Are state and Federally required posters displayed?	_____	_____
C. Other Communications		
1) Does the employer distribute employee handbooks or manuals?	_____	_____
2) Does the handbook state that it is not a contract?	_____	_____
3) Does the handbook state that it is not inclusive and is subject to change without notice?	_____	_____
4) Does the employer periodically issue written policy statements or bulletins?	_____	_____
5) Does the employer issue periodic publications, newsletters, etc.	_____	_____
6) Does the employer have a "suggestions" program?	_____	_____

- | | YES | NO |
|---|-------|-------|
| 7) Is the program reinforced and encouraged by publicity, and follow-up on ideas? | _____ | _____ |
| 8) Do employees know the high level officials of the employer? | _____ | _____ |

VI. EMPLOYEE COMPLAINTS

	YES	NO
1. Does the employer provide written grievance procedures?	_____	_____
2. Does the procedure define what a grievance is?	_____	_____
3. Is the definition of grievance or dispute sufficiently broad to encompass most complaints?	_____	_____
4. Does the procedure provide access personally to high level employer personnel?	_____	_____
5. Does the procedure allow for bypassing the first level supervisor in limited circumstances?	_____	_____
6. Does the procedure specify that the final decision rests with a specific employer official?	_____	_____
7. Does the employer maintain a documentation system of grievances filed?	_____	_____

Comments :

VII. WORK RULES AND DISCIPLINE

	YES	NO
1. Does the employer provide the employee with specific, written work rules?	_____	_____
2. Does the employer have a specific policy and procedural statements regarding discipline?	_____	_____
3. Does the employer provide progressive discipline?	_____	_____
4. Does the grievance procedure include specific action and appeal processes in cases of discipline?	_____	_____
5. Are the events leading to discipline documented?	_____	_____
6. Does documentation also include the nature of the discipline imposed and the reasons for that particular method of discipline?	_____	_____

Comments :

VIII. TERMINATION OF EMPLOYMENT

	YES	NO
1. Where appropriate, does the employer give the employee an opportunity to hear the charges against him and present evidence on his behalf before discharge or suspension without pay?	_____	_____
2. Does the employer give the employee an opportunity to review and appeal the basis for his termination?	_____	_____
3. Does the employer require an exit interview?	_____	_____
4. Does the employer have a routine and appropriate method of responding to job reference inquiries?	_____	_____
5. Does the employer maintain statistical information regarding its dismissals and quits?	_____	_____

Comments:

IX. COMPENSATION AND BENEFITS

	YES	NO
1. Does the employer maintain comparative data on labor market conditions, such as area wages and wages paid by comparable employers?	_____	_____
2. Does the employer keep comparative data on benefits?	_____	_____
3. Does the employer have referral sources for the above information?	_____	_____
4. Does the employer survey employees regarding their attitude toward compensation and benefits?	_____	_____
5. Does the employer make regular, predictable adjustments to compensation?	_____	_____
6. If the employer gives merit increases, are there specific forms, procedures and criterion involved in the process?	_____	_____
7. Is the employee's immediate supervisor involved in merit reviews?	_____	_____
8. If the employer uses a cost of living or general increase method of compensation adjustments, is there a specific basis or index for the increase?	_____	_____
9. Is the employer's compensation policy in compliance with Wage and Hour Rules?	_____	_____
10. Does the employer have specific overtime policies?	_____	_____
11. Does the employer have a system for assigning overtime?	_____	_____
12. Does the employer provide lunch and rest periods?	_____	_____
13. Does the employer provide specialized clothing when necessary?	_____	_____

- | | YES | NO |
|---|-------|-------|
| 14. Does the employer pay for "on call" time? | _____ | _____ |
| 15. Are the employer's pregnancy/maternity benefits commensurate with other related benefits? | _____ | _____ |
| 16. Does the employer have sick leave abuse policy? | _____ | _____ |
| 17. Does it encourage attendance; does it identify offenders? | _____ | _____ |
| 18. Does the employer provide employees with a cost analysis of benefits (the hidden paycheck)? | _____ | _____ |

BENEFIT PLANS

A. Hospitalization

- 1) Hospitalization carrier _____
- 2) New employee is eligible to participate after _____
- 3) Is there a minimum number of hours per week an employee must be scheduled to work to be eligible to participate in this plan?
 _____ Yes _____ No (Specify) _____
- 4) What portion of the hospitalization costs does the employer and the employee pay?

	Employer Cost Per Month	Employee Cost Per Month
_____ Employee only	_____	_____
_____ One dependent	_____	_____
_____ Two or more dependents	_____	_____
_____ Other (specify)	_____	_____

- 5) List the basic coverage provided in the hospitalization plan.
- _____
- _____

B. Life Insurance

- 1) Life Insurance carrier _____
Amount _____
- 2) New employee is eligible to participate after _____
- 3) Is there a minimum number of hours per week an employee must be scheduled to work to be eligible to participate in this plan?
_____ Yes _____ No (Specify) _____
- 4) What portion of the life insurance does the employer and the employee pay?
- | | |
|-------------------------|-------------------------|
| Employer Cost Per Month | Employee Cost Per Month |
| _____ | _____ |
- 5) Is Accidental Death and Dismemberment (AD&D) coverage a part of the insurance coverage? _____ Yes
_____ No
- If so, specify amount of coverage and cost per month.
- Amount _____
- Cost per month _____

C. Accident and Sickness Insurance

- 1) Sickness and accident insurance (weekly indemnity) carrier _____
- 2) Weekly income _____
- 3) What is the effective date of coverage for:

sickness _____ accident _____

4) What is the maximum number of weeks an employee can collect under this program? _____

5) New employee is eligible to participate after _____

6) Is there a minimum number of hours per week an employee must be scheduled to work to be eligible to participate in this plan?

_____ Yes _____ No (Specify) _____

7) What portion of the weekly indemnity plan does the employer and the employee pay?

Employer Cost Per Month Employee Cost Per Month

D. Pension

1) Pension carrier _____

2) New employee is eligible to participate after _____

3) Is there a minimum number of hours per week an employee must be scheduled to work to be eligible to participate in this plan?

_____ Yes _____ No (Specify) _____

4) What portion of the pension plan does the employer and the employees pay?

Employer Cost Per Month Employee Cost Per Month

5) What is the benefit level upon retirement under this plan? _____

E. Sick Pay (uninsured)

1) Is there an uninsured sick pay policy for employees?

Yes _____ No (Specify how earned, eligibility, _____
Maximum limits, etc.)

- 2) Sick days can be used for
- _____ Employee illness only (including pregnancy
related illness
_____ Family illness (disability))
_____ Personal business
_____ Other (Specify) _____
- 3) Unused sick days are
- _____ Paid to employee upon termination
_____ Paid to employee once a year
_____ A form of insurance that is only paid when
used

F. Unpaid Leaves

- 1) Are employees eligible for leaves of absence?
 ____ Yes ____ No
 ____ Maternity/Child Rearing ____ Education
 ____ Medical reasons ____ Military
 ____ Personal reasons ____ Other (Specify)

- 2) New employees eligible for unpaid leave after _____

G. Paid Leaves

- 1) Are employees eligible for paid leaves of absence other than sick pay?
- | | |
|---------------------|-----------------------|
| _____ Jury duty | _____ Voting |
| _____ Funeral leave | _____ Other (Specify) |
| | _____ |
- 2) New employees eligible for paid leave after

H. Vacations

- 1) Months/Years of Service = Days/Weeks of Paid Vacation
- 2) Can employees receive pay in lieu of time off?
_____ Yes _____ No
- 3) Is accrued vacation paid upon termination?
_____ Yes _____ No
- 4) Are employees permitted to carry over vacation from year-to-year? _____ Yes _____ No

I. Holidays

- 1) List -
- 2) New employees are eligible after: _____
- 3) In order to receive pay for a holiday, what additional restrictions are placed on eligible employees?
_____ Work the day before and after a holiday
_____ None
_____ Other (Specify) _____
- 4) If employees are required to work on a holiday, how are they compensated?
_____ Straight-time for all hours worked plus holiday pay
_____ Time and one-half (1 1/2) their hourly rate for all hours worked plus holiday pay
_____ Time and one-half (1 1/2) their hourly rate for all hours worked, in lieu of holiday pay
_____ Compensatory time off _____ Other (Specify) _____

J. Other

If employees are eligible for other benefits, please specify below:

Benefit

Eligibility

Cost

Comments on Compensation and Benefits:

X. PERFORMANCE APPRAISAL, PROMOTION, ASSIGNMENT

	YES	NO
1. Does the employer provide written forms and procedures for evaluation?	_____	_____
2. Is the evaluation performed with appropriate frequency?	_____	_____
3. Does the evaluation process serve as a basis for merit increases, promotions or job assignments?	_____	_____
4. Is the evaluation based on express, objective criteria known to the employee?	_____	_____
5. Is the evaluation done by first line supervisors?	_____	_____
6. Is the evaluation discussed with the employee?	_____	_____
7. Is the employee given the opportunity to appeal his evaluation?	_____	_____
8. Does the evaluation provide specific areas for employee improvements?	_____	_____
9. Is supervisory follow-up provided to assist the employee towards improvement objectives?	_____	_____
10. Are team evaluations made when appropriate?	_____	_____
11. Are job openings posted?	_____	_____
12. Are vacancies filled by an express bidding procedure?	_____	_____
13. Do job postings provide information on wages, hours, title and job description?	_____	_____
14. Are unsuccessful candidates advised of reasons for non-selection?	_____	_____

15. On what basis are jobs awarded? _____ Seniority _____ Ability
_____ Prior Experience _____ Other (Specify) _____

Comments:

XI. REDUCTION IN FORCE

1. Has there ever been a reduction in the work force?

_____ Yes _____ No

Explain _____

If so, how are layoffs determined? _____ Seniority

Alone _____ Ability _____ Seniority and Ability

_____ Other (specify)

2. If so, are employees scheduled for layoff transferred into vacant or new jobs/departments? _____ Yes _____ No

Explain _____

3. Can employees scheduled for layoff displace or "bump" employees in other jobs/departments? _____ Yes _____ No

Explain _____

4. Are laid-off employees eligible for recall? _____ Yes
_____ No

For what period of time (Specify) _____

5. Are employee hours reduced rather than the number of employees? _____ Yes _____ No

Explain _____

6. For what programs or benefits are laid-off employees eligible? _____

7. Is there a written policy on transfers, layoffs and recalls? _____ Yes _____ No

What are the key factors?

If no explain _____

Comments:

XII. PHYSICAL ENVIRONMENT

	YES	NO
1. Is the physical facility and equipment up to date?	_____	_____
2. Does the employer provide adequate sanitation and housekeeping of the facility?	_____	_____
3. Does there appear to be adequate light, ventilation, heat?	_____	_____
4. Does the noise level appear to be tolerable?	_____	_____
5. Is there a dispensary, nurse or first-aid facility?	_____	_____
6. Are employees trained in first-aid?	_____	_____
7. Are parking facilities lighted after dark?	_____	_____
8. Is there an emergency evacuation plan?	_____	_____
9. Is locker space available for employees?	_____	_____
10. Are lockers secure?	_____	_____
11. Are bathrooms clean and well stocked?	_____	_____
12. Are there separate eating/break areas?	_____	_____
13. Are eating areas clean and attractive?	_____	_____
14. Is food provided (cafeteria or vending machines)?	_____	_____
15. Is food subsidized?	_____	_____
16. Are there any glaring safety hazards?	_____	_____
17. How accessible is the facility to non-employees?	_____	_____
18. Is there a security force?	_____	_____

19. Are there security/safety devices such as smoke alarms, sprinklers, burglar alarms, TV surveillance, etc.?

YES

NO

Comments:

XIII. SUPERVISION

- | | | | |
|-----|--|-------|--------------|
| 1) | Average age, length of service, background or supervisors? | _____ | |
| 2) | What percentage of supervisors are | | |
| | Promoted from within? | _____ | Hired? _____ |
| | | YES | NO |
| 3) | Are supervisors ever demoted into non-supervisory positions | _____ | _____ |
| 4) | Does the employer provide supervisors with specific training and guidelines regarding their job responsibilities? | _____ | _____ |
| 5) | Are the supervisors provided with specific job descriptions? | _____ | _____ |
| 6) | Does the supervisor exhibit an understanding of the "human relations" component of his or her job, particularly regarding performance evaluation of employees? | _____ | _____ |
| 7) | Does the supervisor meet individually with employees? | _____ | _____ |
| 8) | Does the supervisor organize and run group meetings? | _____ | _____ |
| 9) | Does the supervisor promote the proper lines of authority within the hierarchy of the employer? | _____ | _____ |
| 10) | Is the supervisor involved in personnel decision making? | _____ | _____ |
| 11) | Does the supervisor participate in general the employer's planning? | _____ | _____ |
| 12) | Does the supervisor follow-up particular performance concerns? | _____ | _____ |

- 13) Do supervisors receive economic considerations, benefits or incentives beyond that given to other employees?

YES

NO

Comments:

XIV. UNION ACTIVITY

- | | YES | NO |
|--|-------|-------|
| 1. Does the employer have an active prevention program? | _____ | _____ |
| 2. Are the supervisors aware of the role they play in an organization attempt? | _____ | _____ |
| 3. Is the employer an active advocate of its non-union status? | _____ | _____ |
| 4. Is there a written strategy concerning a union organizing attempt? | _____ | _____ |
| 5. Is management aware of the "Do's" and "Don'ts" of an organizing campaign? | _____ | _____ |
| 6. Does a member of the Management Team belong to a local Personnel Association to keep abreast of current labor trends and local union organizing activity? | _____ | _____ |
| 7. Does the Management Team subscribe to any Personnel periodicals to keep up-to-date on labor relations trends? | _____ | _____ |
| 8. Has a union ever attempted to organize this facility? | _____ | _____ |
| 9. If so, what steps were taken after the campaign to ensure that there would be no repeat attempt? | _____ | _____ |

Comments :

A.2 TEACHER EVALUATION

A.72

EVALUATION OF CERTIFICATED STAFF

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I. The Lawyer's Role.

A. General Principles.

1. The law is not all encompassing.

a. It is within the competence of professional educators to devise appropriate models and procedures for evaluation.

b. The law sets certain minimum guidelines, most of them procedural.

i. Statutory.

ii. Case law.

c. For example: The term "incompetency."

i. Under Nebraska statutes incompetency "includes but shall not be limited to demonstrated deficiencies or shortcomings in knowledge of subject matter, teaching or administrative skills."

ii. Under Nebraska case law, incompetency must not be measured in a vacuum nor against the standard of perfection but must be measured against the standard required of others performing the same or similar duties and there must be evidence that the performance of the teacher in question was below the standard required of other teachers performing the same or similar duties. Evidence that a particular duty was not competently performed on certain occasions does not ordinarily establish incompetency sufficient to constitute just cause for termination. Moreover, mere board or parental dissatisfaction with the teacher's performance does not amount to incompetency.

iii. In reality, the whole content of the term "incompetency" is left open for educators to fill in.

2. Educators and board members, not lawyers, must decide what standards to expect of teachers.

3. Lawyers must review standards for consistency with statutory law and court decisions.
 - a. The law regarding teacher tenure.
 - b. Antidiscrimination law.
 4. Lawyers must help draft and review procedures for evaluating teachers' compliance with standards which educators and board members have adopted.
 5. Any evaluation system must have two goals:
 - a. To aid in the development of excellent teachers. This is the primary goal.
 - b. Aid in the termination of poor teachers. This is a secondary goal.
 6. These goals must be kept in mind in devising evaluation procedures.
- B. Specific tasks for the lawyer.
1. Help draft procedural aspects of an evaluation system.
 - a. The attorney should inform a drafting committee composed of educators of the procedural requirements imposed by law.
 - b. The attorney should review the draft proposal of the educator committee and make any necessary changes.
 2. The attorney should review substantive competencies expected of teachers as drafted by the educator committed for:
 - a. Consistency with state statutes.
 - b. Consistency with state and federal court decisions regarding:
 - i. Teacher tenure; and
 - ii. Discrimination in employment.
 - c. Compatibility with demands of the teacher termination process. The attorney should ask:
 - i. Are the standards clear and understandable?

- ii. Are they reasonably related to what a school district may expect of a teacher?
 - iii. Does the evaluation instrument facilitate clear indication of what will need to be proved in a hearing?
- 3. The attorney should provide in-service for school district staff who will be evaluating teachers on the following:
 - a. Appropriate documentation for a teacher having performance problems.
 - b. Preparation for and participation in non-renewal or termination hearings.
- 4. The attorney should provide in-service to the board of education to be sure board members understand the requirements of the law regarding teacher non-renewal and termination procedures.
- 5. The attorney should at the request of the school administration review files of teachers having performance problems and confer with school district staff concerning:
 - a. The adequacy of documentation for non-renewal or termination.
 - b. Additional documentation and/or procedures which must be followed.
- 6. Once the administration makes a decision not to renew or to terminate the teacher, the attorney should review the facts in the particular case to make sure the required procedures have been followed and advise the administration concerning the procedures which must be followed in the future.
- 7. The attorney should review for appropriate content the letter to the teacher announcing the decision not to renew or to terminate, especially if state law requires this letter to contain a statement of the reasons for the action.
- 8. If the attorney is representing the school administration in the hearing, the attorney should prepare for the hearing in the manner outlined in the materials on the Administrative Process and also help secure counsel for the board of education if appropriate.

9. If the attorney will be representing the board of education at the hearing, the attorney should help the school administration secure competent legal counsel to present the administration's case.
10. The attorney should participate in the hearing in one role or the other as outlined in the materials on the Administrative Process.
11. The attorney should defend the board's action in court if litigation ensues and advise the board and the administration concerning this litigation.

II. How Not To Terminate a Tenured Teacher - The Hollingsworth Case.

A. Hollingsworth v. Board of Education, 208 Neb. 350, 303 N.W.2d 506 (1981).

1. Basic facts:

- a. The teacher taught life science in the middle school in Alliance, Nebraska, and was also the cross-country coach.
- b. The teacher was hired in September of 1976.
- c. The teacher was tenured as of September 1, 1978.
- d. On January 31, 1979, the principal asked for the teacher's resignation. The teacher refused to resign.
- e. On April 3, 1979, the principal recommended the teacher's termination for incompetency.
- f. The hearing before the Board of Education was held on May 1, 1979.

2. The evidence in the record:

- a. The principal's testimony.
 - i. The principal recommended the termination of Mr. Hollingsworth on the following grounds:
 - (a) He left the classroom unattended while students were present.

- (b) He was unable to handle student misbehavior.
 - (c) He was unable to control his classroom.
 - (d) He lacked rapport with students.
 - (e) He lacked rapport with parents.
 - (f) He did not have good relationships with fellow staff members.
 - (g) His personal appearance and mouth and body odor interfered with his performance.
 - (h) He was not punctual for classes.
- ii. The basis for the principal's testimony concerning classroom control was the following:
- (a) Reports from students and parents.
 - (b) Personal observation.
 - (c) A survey of fifty students.
- iii. Each visit of the principal was verified by a written visitation and observation report as follows:
- (a) The first visit on September 26, 1976.
 - (1) This observation contained lots of compliments.
 - (2) It also contained some suggestions concerning students talking.
 - (b) Subsequent observations on October 21, 1976 and November 22, 1976 contained no criticisms of Mr. Hollingsworth.
 - (c) On the January 7, 1977, appraisal, Mr. Hollingsworth was rated positively in 36 out of 37 categories. There was written mention of an odor problem.

The principal recommended renewal of Mr. Hollingsworth's contract for the 1977-78 school year.

- (d) On the September 16, 1977, observation log, Mr. Hollingsworth was commended for good classroom control.
 - (e) Observation logs for October 21, 1977, November 30, 1977, January 13, 1978, February 6, 1978, February 10, 1978, and February 16, 1978 were uniformly praiseworthy of Mr. Hollingsworth's teaching ability and classroom control.
- iv. Mr. Hollingsworth became a tenured teacher as of September 1, 1978.
- (a) Observation logs for September 15, 1978, and October 24, 1978, contained no criticisms of Mr. Hollingsworth's teaching.
 - (b) The November 15, 1978, log gave a good report on Mr. Hollingsworth's classroom control.
 - (c) The December 20, 1978, observation log was generally praiseworthy of Mr. Hollingsworth but did make a suggestion that students should sharpen their pencils before class.
- v. On January 31, 1979, the principal asked for Mr. Hollingsworth's resignation. There was nothing in the record concerning what happened between the last observation on December 20, 1978, and the decision to call for Mr. Hollingsworth's resignation.
- vi. The principal testified that Mr. Hollingsworth had disciplinary problems because his disciplinary referrals to the assistant principal were excessive compared to other teachers. As a matter of fact, however, twenty-two of the twenty-seven

referrals came after February 6, 1979.

- vii. The principal testified that on March 26, 1979, he administered a fifty student survey which showed that Mr. Hollingsworth had poor relationships with students. On cross-examination, the principal admitted that, despite his efforts to conceal the purpose of his survey, the students could have been aware of its purpose. Obviously such awareness by the students could well have destroyed the validity of the survey.
 - viii. The principal testified that on one occasion Mr. Hollingsworth left his classroom unattended. On cross-examination, the principal admitted that he later learned that Mr. Hollingsworth had received a severe shock from electrical machinery and was recovering in the teachers' lounge on this occasion.
 - ix. The principal admitted that Mr. Hollingsworth put in longer hours than any other teacher and that he often volunteered for additional work.
 - x. Rather than assessing Mr. Hollingsworth's performance in light of the performance in fact accepted for other teachers, the principal testified that he took into consideration the performance level criteria which were established in the teacher's manual. The teacher's manual was offered into evidence but contained no standards or criteria by which to measure or gauge the performance of an individual teacher.
- b. The testimony of the assistant principal.
- i. The assistant principal testified that this was his first year at school.
 - ii. He further testified that he had no basis for comparing the number of disciplinary referrals this year with last year.

- iii. On cross-examination, he admitted that 81% of the teachers' disciplinary referrals came after February 6, 1979.
 - iv. On cross-examination, he admitted that the principal's request for a resignation may have had some bearing on Mr. Hollingsworth's disciplinary problems.
- c. The testimony of the athletic director.
- i. The athletic director testified that Mr. Hollingsworth lacked rapport with coaches and athletes. He based his testimony on two incidents.
 - (a) On one occasion some students placed sugar in Mr. Hollingsworth's gas tank.
 - (b) On another occasion, Mr. Hollingsworth's windows were soaped.
 - ii. On cross-examination, the athletic director admitted that he had rated Mr. Hollingsworth above average in thirteen of fifteen rating categories. In this report, the athletic director commented that Mr. Hollingsworth is a good organizer, pursues different avenues in an attempt to motivate athletes, and his work is well done.
- d. The testimony of the earth science teacher who was the prior cross-country coach.
- i. The earth science teacher testified concerning the deteriorating relationship between himself and Mr. Hollingsworth which started when Mr. Hollingsworth wrote a letter to the principal criticizing the earth science teacher for interfering with Mr. Hollingsworth's duties as cross-country coach.
 - ii. The earth science teacher did testify concerning Mr. Hollingsworth's problem with body odor. However, his testimony was silent as to when the problem arose, how often it arose, or whether

the problem was getting better or worse.

e. The testimony of the physical education teacher in the office next door.

i. The physical education teacher testified that students often gathered in the hallway outside Mr. Hollingsworth's room. However, the teacher admitted that this was not unusual for any teacher at the school.

ii. She testified concerning a locker room comment by an unnamed female student concerning Mr. Hollingsworth's personal hygiene.

iii. She also testified that many fellow coaches felt Mr. Hollingsworth was distant.

f. The testimony of the eight grade math teacher.

i. The math teacher testified concerning distant relationships between Mr. Hollingsworth and other staff members. However, he testified that in the last year, Mr. Hollingsworth had put more effort into being accepted than in past years.

ii. He testified that he had no personal knowledge of Mr. Hollingsworth having any personal hygiene problems, but that some students had complained about it.

iii. He testified that he was unaware of Mr. Hollingsworth having any discipline problems.

3. The Board of Education's findings of fact:

a. Mr. Hollingsworth frequently left the classroom unattended while students were present.

b. Mr. Hollingsworth was unable to control his classroom.

- c. Mr. Hollingsworth was unable to handle student misbehavior.
 - d. Mr. Hollingsworth lacked rapport with student.
 - e. Mr. Hollingsworth lacked rapport with his fellow staff members.
 - f. Mr. Hollingsworth's body odor interfered with his teaching performance.
4. The decision of the district court.
- a. The district court found that Mr. Hollingsworth was unable to control his classroom and handle student misbehavior.
 - b. Mr. Hollingsworth's personal hygiene adversely affected his performance.
 - c. Therefore, the district court affirmed the decision of the board of education.
5. The decision of the Nebraska Supreme Court.
- a. The school district's case is a house of straw.
 - i. The principal's testimony is contradicted by his written observations.
 - ii. The disciplinary referrals were few in number until the principal asked for Mr. Hollingsworth's resignation. The disciplinary referrals grew in number after that time apparently because the students became aware of Mr. Hollingsworth's problems. The Court also felt that the student survey was tainted because of this knowledge by the students.
 - b. The Court held that strict adherence to the rules of evidence cannot be demanded in teacher termination hearings, but the basic principles of due process demand that hearsay statements of students be given little if any weight.
 - c. The Court held that a man's profession and tenure should not depend on the olfactory sensitivities of only two members of a teaching staff and, at the very least, a

teacher should be given an opportunity to take corrective action.

- d. The Court held that the principal's evaluation was suspect because of a failure to compare Mr. Hollingsworth's performance with that of other staff members.
- e. Therefore, the Nebraska Supreme court reversed the decision of the district court and found that Mr. Hollingsworth had been improperly terminated.

B. The lessons of Hollingsworth.

- 1. Oral testimony should be consistent with written documentation.
- 2. Evidence of appropriateness of the decision to terminate should be judged as of the date the decision to terminate is made.
- 3. A teacher's performance should be judged in light of what is, in fact, expected of other teachers.
- 4. Hearsay statements of students should be given little if any weight.
- 5. Administrators need training in appropriate evaluation and observation!!!

III. Practical Advice Regarding Documentation.

A. What should be documented?

- 1. Unsatisfactory behavior.
- 2. Exemplary behavior.

B. How should the school administration document?

- 1. Contemporaneously.
- 2. Factually.
- 3. In light of the standard that is expected of other teachers.
- 4. Clearly; mixed messages should not be sent.
- 5. Any written communication to the teacher should have a space on it for the teacher to acknowledge receipt of the written document.

6. Administrative staff should realize that anything they write could see the light of day in a hearing.
7. The teacher should be given an opportunity to respond in writing and to have a follow-up conference concerning any unsatisfactory performance noted by the evaluator.
8. Administrative staff should make suggestions in writing for improvement.
9. Administrative staff should offer the teacher help from the start in overcoming his or her inadequacies.
10. Administrative staff should keep concerns expressed to the teacher consistent with those behaviors which are specified as matters of concern in the appraisal document.

C. Review of sample documents.

1. The written materials for this seminar contain samples of the evaluation process for certain school districts:
 - a. Des Moines, Iowa.
 - b. Omaha, Nebraska, as of August 1986.
 - c. Sample forms recommended by Kelly Frells.
2. The focus of this presentation is on certain aspects of this process:
 - a. The sample appraisals are hypothetical documents.
 - b. The observation logs and the letters notifying the teacher of the reasons for non-renewal or termination are actual documents with names deleted to protect the privacy interests of the teachers involved.
3. Examination of the probationary teacher forms.
 - a. These forms must be analyzed in light of the standard for non-renewal of a probationary teacher. Under Nebraska law, the board of education may non-renew the contract of a probationary teacher for any reason it deems sufficient. However, under Nebraska law, the school administration must offer speci-

fic employment-related reasons for the non-renewal, if the teacher requests such reasons.

- b. Also, under Nebraska law, a probationary teacher is entitled to an informal hearing before the board of education on the administrative recommendation of non-renewal.
- c. The goal here: to examine these sample forms and point out common mistakes that administrators often make in marking appraisal instruments.
- d. The appraisal for May 25, 1983.
 - i. The issue on page one of the form: Should the school district retain satisfactory teachers?
 - ii. Resolution of this issue: This is a decision for the school administration and board of education to make. Once made, however, this decision should be clearly communicated to all teaching staff and all administrators involved in the observation and evaluation process.
 - iii. The issues on page two of this appraisal:
 - (a) How should the administrator mark the summary statement bar graphs at the top of the page.
 - (1) Honestly.
 - (2) In light of his or her overall assessment. The administrator should not simply add up the marks on the first page. Some evaluation categories are more important for determining overall satisfactory performance than others.
 - (b) What kinds of comments should the administrator place in the comments section of the appraisal instrument.

- (1) This is not the place for unnecessary "pats on the back." If the teacher is having performance problems, "pats on the back" are inappropriate in this section.
- (2) This section should list major problems, if any, the teacher is encountering.
- (c) When should the administrator visit the classroom to observe the teacher?
 - (1) As required by the appraisal instrument.
 - (2) As often as required to effectively monitor performance or aid performance.
 - (3) Observations should not be bunched into one narrow time band nor should they occur at the same time each day.
- (d) The administrator should insist that the teacher sign the appraisal, especially since the signature simply acknowledges receipt of the appraisal and not agreement with it.
- (e) The February 21, 1984, appraisal.
 - (1) This is generally a more positive appraisal and there are no indications of serious problems in the comment section.
 - (2) Forms should be carefully checked to make sure they are properly filled out. There is an error on the dates of the last three observations.

- (f) The May 14, 1984, appraisal.
 - (1) Compare the poor example with the good example.
 - (2) The essential lesson:

If the teacher's performance is unsatisfactory the administrator should say so clearly on paper.
 - (3) The problem of the apparent inconsistency between the good example of the May 14, 1984, appraisal and the appraisal of February 21, 1984.
- (g) Appropriate use of observation logs.
 - (1) The observation logs should support specific reasons for non-renewal.
 - (2) The observation logs should collectively show that the problems the teacher was experiencing are not just occasional.
 - (3) The observation logs should document that assistance was given to the teacher and that suggestions were made for improvement.
 - (4) As a general rule compliments are not inconsistent with an ultimate recommendation for termination or non-renewal, especially early in the observation process.
 - (5) The teacher should be required to sign the observation log, so that later on there is no question about the teacher's having seen the concerns raised in the observation log.

- (6) The administrator observing and filling out the observation log should visit with the teacher concerning the observation afterward and make written documentation of the topics covered in the conference. (See the forms utilized in the School District of Omaha Guide for Evaluation.)
- (h) The June 19, 1984, non-renewal reasons letter.
 - (1) This letter should state the reasons for non-renewal.
 - (2) It should elaborate on the reasons in sufficient detail to permit the teacher to know clearly what the reasons are and also to prepare for any hearing she or he might be entitled to.
 - (3) The letter should tie the reasons for non-renewal to documented observations.
 - (4) It should list witnesses who will be called by the school administration in any hearing.
 - (5) It should enclose any documents which the school administration intends to use in the hearing.
 - (6) This non-renewal reasons letter is less elaborate than a similar letter provided to a tenured teacher who is to be terminated. See the letter dated April 25, 1985, which is also included in your materials.

4. Examination of the tenured teacher forms.

- a. These forms must also be analyzed in light of the standard for termination of a tenured

teacher. Under the Nebraska law, the board of education may not terminate the contract of a tenured teacher except for just cause. One of the just cause conditions is incompetency as defined earlier in these materials.

- b. These forms must also be analyzed in light of the kind hearing which a tenured teacher is entitled to. Under Nebraska law, a tenured teacher is entitled to a formal due process hearing before the board of education votes on an administration recommendation of termination.
- c. Although observation logs for tenured teachers are not explicitly included in these materials, the observation logs for a tenured teacher play the same role as those for probationary teachers. The same comments made regarding observation logs for probationary teachers are equally applicable to those regarding tenured teachers.
- d. The January 7, 1977, and February 8, 1980, appraisals.
 - i. These appraisals appear to indicate that the tenured teacher is an excellent teacher.
 - ii. However, even if the administrator sees no problems with teaching performance, the administrator should not be careless either in filling out the forms or in carrying out the appraisal.
 - (a) Note that the forms are not carefully filled out as to the date of the observation and length of visit.
 - (b) Also note that for the most part actual teaching was not observed.
 - iii. There are two separate lessons here:
 - (a) It is vital to a sound appraisal system that administrators observe actual teaching even by highly qualified tenured teachers.

- (b) If you as an attorney find yourself in a situation of aiding in the termination of a tenured teacher who has many years of good overall appraisals, examine those forms very carefully to make sure that appropriate appraisal was in fact carried out.
- e. The March 10, 1983, appraisal.
 - i. On this appraisal problems have surfaced.
 - ii. The school is the same, but the principal appraising the teaching has changed.
 - iii. The problem of assessing what has really changed in three years.
 - (a) The teacher's performance?
 - (b) A new principal who is a tougher grader?
 - iv. The comment section on this particular appraisal is inadequate because it does not specify those major areas where the teacher needs to develop strengths to become an effective classroom teacher.
 - v. An administrator should not mark an overall appraisal of performance as satisfactory unless the principal generally believes that the overall performance is satisfactory. Note the inconsistency between the principal's appraisal of certain key areas of performance as being unsatisfactory on the first page of this appraisal and the principal's overall appraisal on the second page that the teacher's performance is satisfactory.
 - vi. Efforts extended by the building administrator and other staff to help a troubled tenured teacher should be documented as well. This documentation need not be done on the appraisal form. However, the appraisal form, in

the comment section, should make some reference to efforts to help.

f. The February 23, 1984, appraisal.

i. Note that the tenured teacher has been assigned to a new school.

(a) The problem of when and whether to reassign a teacher experiencing performance difficulties.

(1) If the teacher is not reassigned, generally there is an allegation that the problem stems not from the teachers poor performance but from a personality difficulty with the principal.

(2) If the teacher is transferred, generally the allegation is made that the poor appraisal stems not from poor performance, but from giving the teacher insufficient time to adjust to new circumstances.

ii. Note also that there is a new principal at the new school.

iii. Also note that the appraisal generally is more favorable, although certain problems are specified in the comment section regarding key performance categories.

g. The February 25, 1985, appraisal.

i. This is a good example of documentation in an appraisal sufficient to support the termination of a tenured teacher.

(a) Poor performance in certain key areas is clearly documented on the first page of the appraisal.

(b) The overall appraisal categories are clearly marked as unsatisfactory.

- (c) The comment section references efforts to help the teacher.
- (d) The comment section specifies the major problems which the teacher was experiencing.
- (e) The observations are well spaced, took place in the classroom, and were of sufficient length to truly observe teaching.
- (f) Even on this appraisal, however, two key things are missing:
 - (1) The principal's written recommendation in the comment section that the teacher's contract be terminated.
 - (2) The signature of the teacher.
- h. The April 25, 1985, letter specifying the reasons for termination of a tenured teacher.
 - i. This letter should inform the teacher of his or her rights.
 - ii. This letter should give notice of the time and place of the hearing.
 - iii. This letter should list the reasons for termination in sufficient detail for the teacher to prepare for the hearing.
 - iv. This letter should list the witnesses who will appear against the teacher.
 - v. This letter should detail the nature of the witness's testimony:
 - (a) This letter is as detailed as it is in order to induce a resignation.
 - (b) There are certain risks in being this detailed: the administration's entire case is fully detailed for the teacher's attorney.

- (c) Note the reference made throughout the letter to actual documented observations.
 - vi. This letter should enclose the exhibits which the administration intends to introduce.
 - vii. This letter should offer an additional opportunity for the teacher and his or her attorney to review the teacher's personal file.
 - viii. This letter should formally offer to work with the attorney for the teacher to stipulate as much of the record as is possible.
 - ix. This letter should also discuss the hearing procedures; and, if the board of education is not to be represented at the hearing by an attorney, the letter should discuss these procedures in detail. If agreement regarding this procedure has been obtained orally, the letter should recite this agreement.
- D. What should a lawyer look for in reviewing with the school administration a proposed decision to terminate a tenured teacher?
- 1. Regarding the documents in the teacher's personnel file.
 - a. It should be determined that the concerns expressed orally by the school administration have written foundation in the documents in the personnel file.
 - b. The formal appraisal should be particularly carefully reviewed. There should be multiple low appraisals.
 - c. Any written responses by the teacher to negative comments by administrators in the personnel file should be also carefully reviewed.
 - d. If available, observation logs should be reviewed.

- e. The written materials should indicate that the administration has made efforts to help the teacher solve his or her problems.
 - f. The attorney should check the personnel file for any materials indicating past or pending civil right complaints or charges of discrimination, any garnishments, or any workmen compensation claims.
2. The attorney should determine whether the teacher is in any position to claim his or her termination or non-renewal would violate any first amendment rights.
- a. The attorney should determine whether the teacher has engaged in any recent speech or symbolic speech activities which have caused concern by the school administration.
 - b. The attorney should determine whether the teacher's religious beliefs are in any way involved.
3. The attorney should discuss with the school administration whether there are any problems with any of the people who have evaluated the teacher.
- a. The attorney should determine whether these particular evaluators are high or low graders in comparison with other administrators.
 - b. The attorney should determine whether there are any personal (non-professional) conflicts between the teacher and the evaluators.
 - c. The attorney should determine whether there are more positive past evaluations by other administrators and thoroughly discuss the significance of the differences in the evaluations.
 - d. The attorney should discuss with the school administration what kind of witnesses the evaluators will make. In order to properly make this decision, the attorney should personally interview the evaluators.
4. If the teacher is a member of a labor organization representing the teachers in the school district, the attorney should determine whether

the school administration has had any conversations with the labor organization regarding this particular teacher's problems.

5. The attorney should thoroughly discuss with the school administration how this particular teacher's performance compares to the performance of other teachers performing in similar roles.
6. The school attorney should discuss with the school administration the likely reaction of the board of education to a hearing on the termination of this particular teacher.

IV. What is The Ultimate Goal of The Evaluation Process?

- A. The goal is two-fold:
 1. The best possible education for the children of the school district.
 2. The best possible professional development for teachers.
- B. Goal number one is primary. Therefore a school district should set its goals for teachers as high as possible.
- C. The ultimate practical goal of in-service for administrators on the evaluation process.
 1. The goal is not solely to have administrators properly prepared for a hearing, although this is a necessary and desirable goal.
 2. Rather, the real goal is to have a process that 99 out of 100 times enables a teacher who is having trouble to come to the self realization that he or she does not belong as a teacher in this school system and that he or she should resign.
 3. The critical link in achieving this goal is the manner in which administrators' conferences on the evaluation with the teacher are held.
- D. An actual hearing before the board of education on non-renewal or termination is a last resort.
 1. The evaluation system should function in such a way that administrative staff are not afraid of a hearing and certainly not afraid of a hearing

to the extent that administrators look the other way when they see incompetency.

2. The attorney should clearly communicate to the administrative staff that a teacher termination or non-renewal hearing will be very little problem if the administrative staff have documented properly as follows:
 - a. The appraisal instrument should note in writing serious problems experienced by the teacher. Also, the teacher should be given written suggestions for improving his or her teaching.
 - b. The record should demonstrate that the school administration has made an effort to help the teacher improve.
 - c. The record should demonstrate that the school administration has given the teacher sufficient time to improve.
 - d. The record should demonstrate that the school administration has re-observed and re-evaluated the teacher's performance and should reflect in writing the teachers's failure to sufficiently improve.
3. If all of these procedures are followed the administrative hearing will most likely result in the non-renewal or termination of the teacher involved.

CASE HISTORY - PROBATIONARY TEACHER EVALUATION

David M. Pedersen
Baird, Holm, McEachen,
Pedersen, Hamann & Strasheim

A.98

FIRST YEAR PROBATIONARY
Regular
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

①

Name Priscilla Probie School Schuerman Jr. Hi
Grade/Subject 7th/9th English Date 5-25-83

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior		X		
B. Rapport with Students		X		
C. Rapport with Parents		X		
D. Rapport with Professional Associates		X		
E. Professional Improvement		X		
F. Decision Making			X	
G. Reports and Records		X		
H. Knowledge of Subject Matter			X	
I. Communicative Skills		X		

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques				X		
B. Classroom Organization			X			
C. Out-of-Class Responsibilities			X			
D. Lesson Plans and Goals				X		
E. Classroom Atmosphere			X			
F. Knowledge of Students			X			
G. Student Involvement			X			
H. Respect			X			

III. PERSONAL QUALITIES (Check x)

A. Appearance		X				
B. Demeanor				X		
C. Dependability			X			
D. Tactfulness			X			
E. Attitude Toward Constructive Criticism			X			
F. Cooperation			X			
G. Health			X			
H. Punctuality			X			
I. Enthusiasm				X		
J. Judgment				X		
K. Loyalty			X			

White: Personnel Copy
Yellow: Principal's Copy
Pink: Teacher's Copy

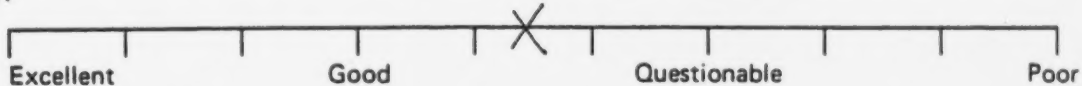
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Ms. Probie has continued to demonstrate good effort and a positive attitude
toward self improvement. She must maintain efforts designed to provide students with
meaningful, well defined learning experiences and must clearly articulate expectations
to students. Based upon Ms. Probie's growth and continued good effort, I would
recommend that she be retained next school year.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>
2/25/83	Victoria Principal	Classroom	30 minutes
3/19/83	T. Supervisor	Classroom	1 hour 10 minutes
3/29/83	Victoria Principal	Classroom	30 minutes
5/3/83	M. Vice Principal	Classroom	48 minutes
4/12/83	T. Supervisor	Classroom	48 minutes

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Victoria Principal 5-25-83

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

SECOND YEAR PROBATIONARY
Regular
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

3

Name Priscilla Probie School Schuerman Jr. Hi
Grade/Subject 7th/9th English Date 2-21-84

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior		X		
B. Rapport with Students		X		
C. Rapport with Parents		X		
D. Rapport with Professional Associates		X		
E. Professional Improvement		X		
F. Decision Making			X	
G. Reports and Records			X	
H. Knowledge of Subject Matter		X		
I. Communicative Skills		X		

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques				X		
B. Classroom Organization			X			
C. Out-of-Class Responsibilities			X			
D. Lesson Plans and Goals			X			
E. Classroom Atmosphere			X			
F. Knowledge of Students				X		
G. Student Involvement			X			
H. Respect			X			

III. PERSONAL QUALITIES (Check x)

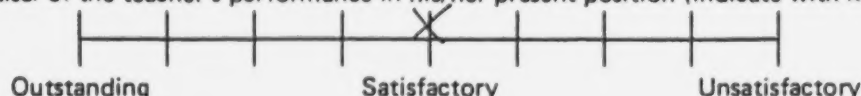
A. Appearance		X				
B. Demeanor				X		
C. Dependability				X		
D. Tactfulness			X			
E. Attitude Toward Constructive Criticism		X				
F. Cooperation		X				
G. Health		X				
H. Punctuality		X				
I. Enthusiasm		X				
J. Judgment				X		
K. Loyalty			X			

White: Personnel Copy
Yellow: Principal's Copy
Pink: Teacher's Copy

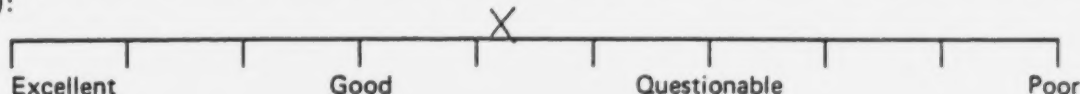
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Ms. Probie continues to demonstrate a desire to improve her performance as a classroom teacher. Her enthusiasm toward the teaching profession should help her in this area. She needs to continue efforts in classroom control and teacher-student relationships.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

Date	Appraiser	Location	Length of Visit
10/17/83	M. Vice Principal	Classroom	48 minutes
11/09/83	M. Vice Principal	Classroom	35 minutes
1/04/84	Victoria Principal	Classroom	35 minutes
1/17/84	M. Vice Principal	Classroom	35 minutes
2/22/84	M. Vice Principal	Classroom	35 minutes
2/27/84	Victoria Principal	Classroom	30 minutes
3/28/84	Victoria Principal	Classroom	30 minutes

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Victoria Principal 2-21-84

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

111

SECOND YEAR PROBATIONARY
Final
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

POOR EXAMPLE!!!

5

Name Priscilla Probie School Scherman Jr. Hi
Grade/Subject 7th/9th English Date 5-14-84

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior		X		
B. Rapport with Students		X		
C. Rapport with Parents		X		
D. Rapport with Professional Associates		X		
E. Professional Improvement		X		
F. Decision Making			X	
G. Reports and Records			X	
H. Knowledge of Subject Matter			X	
I. Communicative Skills			X	

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques					X		
B. Classroom Organization				X			
C. Out-of-Class Responsibilities				X			
D. Lesson Plans and Goals				X			
E. Classroom Atmosphere				X			
F. Knowledge of Students					X		
G. Student Involvement					X		
H. Respect					X		

III. PERSONAL QUALITIES (Check x)

A. Appearance		X					
B. Demeanor					X		
C. Dependability					X		
D. Tactfulness				X			
E. Attitude Toward Constructive Criticism			X				
F. Cooperation			X				
G. Health			X				
H. Punctuality			X				
I. Enthusiasm			X				
J. Judgment					X		
K. Loyalty				X			

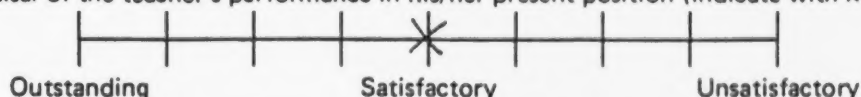
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Yellow: Principal's Copy
Pink: Teacher's Copy

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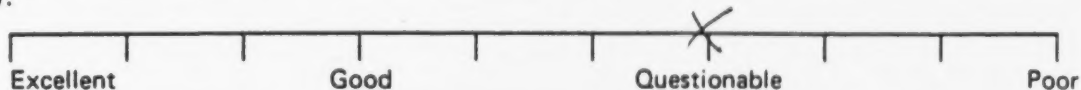
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Ms. Probie has given total commitment and excellent effort toward improving
deficient areas identified on her 2-21-84 appraisal. Unfortunately, progress at enhancing
these areas has been limited. Ms. Probie must continue to appraise her capabilities and
potential as they relate to her becoming a most effective teacher.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>
4/1/84	Victoria Principal	Classroom	40 minutes
4/2/84	Conference	Office	10 minutes
4/3/84	S. Supervisor	Classroom	48 minutes
4/10/84	M. Vice Principal	Classroom	30 minutes
4/12/84	Conference	Office	24 minutes
4/29/84	S. Supervisor	Classroom	48 minutes
5/02/84	Victoria Principal	Classroom	25 minutes
5/05/84	Conference	Office	15 minutes

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

113

7

Name Priscilla Probie School Norbert J. Schuerman Jr. Hi
Grade/Subject 7+9TH English Date 5-14-84

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior		X		
B. Rapport with Students		X		
C. Rapport with Parents		X		
D. Rapport with Professional Associates		X		
E. Professional Improvement		X		
F. Decision Making			X	
G. Reports and Records			X	
H. Knowledge of Subject Matter			X	
I. Communicative Skills			X	

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques					X
B. Classroom Organization			X		
C. Out-of-Class Responsibilities			X		
D. Lesson Plans and Goals			X		
E. Classroom Atmosphere			X		
F. Knowledge of Students				X	
G. Student Involvement			X		
H. Respect			X		

III. PERSONAL QUALITIES (Check x)

A. Appearance		X			
B. Demeanor					X
C. Dependability					X
D. Tactfulness			X		
E. Attitude Toward Constructive Criticism		X			
F. Cooperation		X			
G. Health		X			
H. Punctuality		X			
I. Enthusiasm		X			
J. Judgment				X	
K. Loyalty			X		

White: Personnel Copy
Yellow: Principal's Copy
Pink: Teacher's Copy

114

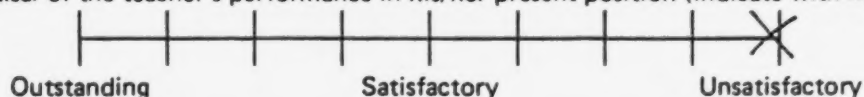
A-105

8

Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Although Ms. Probie has given her total commitment and excellent effort toward improving the deficient areas identified on her 2-21-84 appraisal, she has not been able to make satisfactory progress in remedying her deficiencies. Based upon the serious difficulties which these deficiencies pose for educating youngsters in our School District, I must recommend that Ms. Probie's teaching contract not be renewed at the end of this school year.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Victoria Principal
Signature of Principal

5-14-84
Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

115

FIRST TENURED
Regular
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

9

Name Tom Tenure School Knutzen
Grade/Subject 5th Date 1-7-77

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior	X			
B. Rapport with Students		X		
C. Rapport with Parents	X			
D. Rapport with Professional Associates	X			
E. Professional Improvement	X			
F. Decision Making	X			
G. Reports and Records	X			
H. Knowledge of Subject Matter		X		
I. Communicative Skills	X			

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques	X								
B. Classroom Organization	X								
C. Out-of-Class Responsibilities	X								
D. Lesson Plans and Goals		X							
E. Classroom Atmosphere	X								
F. Knowledge of Students	X								
G. Student Involvement	X								
H. Respect	X								

III. PERSONAL QUALITIES (Check x)

A. Appearance	X								
B. Demeanor	X								
C. Dependability	X								
D. Tactfulness	X								
E. Attitude Toward Constructive Criticism	X								
F. Cooperation	X								
G. Health	X								
H. Punctuality	X								
I. Enthusiasm	X								
J. Judgment	X								
K. Loyalty	X								

White: Personnel Copy
Yellow: Principal's Copy
Pink: Teacher's Copy

Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):

Outstanding Satisfactory Unsatisfactory

I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):

Excellent Good Questionable Poor

Comments: Tom is receptive to suggestions and willingly assumes responsibility. He is
a very innovative teacher and is very well organized. He is also very thoughtful of
others.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>
9/1976		Phys Ed Class	
11/1976		Classroom	
12/1976		Christmas Program	

This appraisal is based on general observations, conferences and comments from
supervisors.

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher Date Ellie Everready 1-7-77
Signature of Principal Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

SECOND TENURED
Regular
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

11

Name Tom Tenure School Knutzen
Grade/Subject 5th Date 2-8-80

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior	X			
B. Rapport with Students	X			
C. Rapport with Parents	X			
D. Rapport with Professional Associates	X			
E. Professional Improvement	X			
F. Decision Making	X			
G. Reports and Records	X			
H. Knowledge of Subject Matter	X			
I. Communicative Skills	X			

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques	X								
B. Classroom Organization	X								
C. Out-of-Class Responsibilities	X								
D. Lesson Plans and Goals	X								
E. Classroom Atmosphere	X								
F. Knowledge of Students	X								
G. Student Involvement	X								
H. Respect	X								

III. PERSONAL QUALITIES (Check x)

A. Appearance	X								
B. Demeanor	X								
C. Dependability	X								
D. Tactfulness	X								
E. Attitude Toward Constructive Criticism	X								
F. Cooperation	X								
G. Health	X								
H. Punctuality	X								
I. Enthusiasm	X								
J. Judgment	X								
K. Loyalty	X								

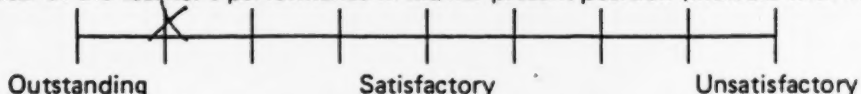
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Pink: Teacher's Copy

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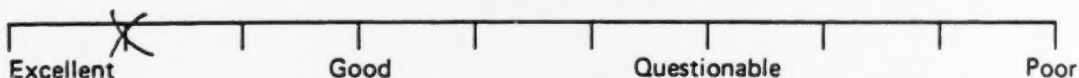
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Mr. Tenure is very receptive to suggestions for improvement. He works very well with others. He is an exceptional teacher in every respect. He works very hard and is a real asset to Knutzen Elementary.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>
9/1979	E. Everready	Safety Patrol Meeting	
10/1979	E. Everready	Classroom	20 minutes
12/1979	E. Everready	Auditorium	

This evaluation is based on general observations, casual visits to the classroom and comments of supervisors and other teachers at Knutzen Elementary.

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

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THIRD TENURED
Regular
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

(13)

Name Tom Tenure School Knutzen
Grade/Subject STh Date 3-10-83

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior		X		
B. Rapport with Students			X	
C. Rapport with Parents			X	
D. Rapport with Professional Associates		X		
E. Professional Improvement		X		
F. Decision Making		X		
G. Reports and Records		X		
H. Knowledge of Subject Matter		X		
I. Communicative Skills		X		

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques				X			
B. Classroom Organization				X			
C. Out-of-Class Responsibilities		X					
D. Lesson Plans and Goals						X	
E. Classroom Atmosphere						X	
F. Knowledge of Students				X			
G. Student Involvement			X				
H. Respect			X				

III. PERSONAL QUALITIES (Check x)

A. Appearance	X						
B. Demeanor			X				
C. Dependability			X				
D. Tactfulness					X		
E. Attitude Toward Constructive Criticism					X		
F. Cooperation			X				
G. Health	X						
H. Punctuality				X			
I. Enthusiasm				X			
J. Judgment				X			
K. Loyalty			X				

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Pink: Teacher's Copy

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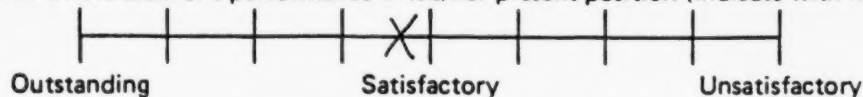
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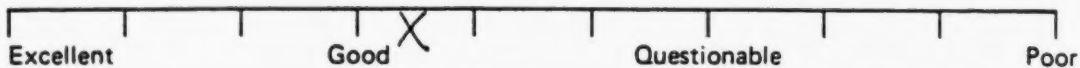
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Mr. Tenure needs to develop strengths in several areas to become an effective classroom teacher. I would encourage him to build an interest in improving in these areas. Effort toward improvement must be sincere and consistent if the students are to receive maximum benefit from his instruction.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>
11/28/82	P. Supervisor	Classroom	80 minutes
1/25/83	T. Toe-the-Line	Classroom	45 minutes
2/6/83	T. Toe-the-Line	Classroom	15 minutes
2/27/83	T. Toe-the-Line	Classroom	35 minutes
3/6/83	T. Toe-the-Line	Classroom	35 minutes
3/8/83	P. Supervisor	Classroom	60 minutes

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Terrence Toe-The-Line 3-10-83

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

FOURTH TENURED
Special
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

15

Name Tom Tenure School Taylor
Grade/Subject Stk Date 2-23-84

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior	X			
B. Rapport with Students		X		
C. Rapport with Parents		X		
D. Rapport with Professional Associates	X			
E. Professional Improvement		X		
F. Decision Making		X		
G. Reports and Records	X			
H. Knowledge of Subject Matter		X		
I. Communicative Skills		X		

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques			X				
B. Classroom Organization				X			
C. Out-of-Class Responsibilities	X						
D. Lesson Plans and Goals				X			
E. Classroom Atmosphere				X			
F. Knowledge of Students				X			
G. Student Involvement			X				
H. Respect			X				

III. PERSONAL QUALITIES (Check x)

A. Appearance		X					
B. Demeanor			X				
C. Dependability	X						
D. Tactfulness				X			
E. Attitude Toward Constructive Criticism			X				
F. Cooperation		X					
G. Health	X						
H. Punctuality	X						
I. Enthusiasm		X					
J. Judgment			X				
K. Loyalty		X					

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Pink: Teacher's Copy

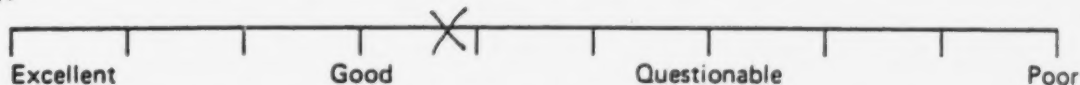
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Mr. Tenure adds much to his classes by exhibiting, displaying and presenting things from nature. However, his teaching often lacks the qualities of effective teaching with respect to management, time on task, self-discipline, and motivation for in-depth learning.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

Date	Appraiser	Location	Length of Visit
9/19/83	S. N. Nonsense	Classroom	30 minutes
9/28/83	S. N. Nonsense	Classroom	45 minutes
10/16/83	S. N. Nonsense	Classroom	25 minutes
1/17 /84	P. Supervisor	Classroom	15 minutes
1/17/84	S.N. Nonsense	Classroom	30 minutes
1/29/84	S.N. Nonsense	Classroom	15 minutes
1/30/84	P. Supervisor	Classroom	30 minutes
2/8/84	S.N. Nonsense	Classroom	30 minutes

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Sally No Nonsense 2-23-84

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

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FIFTH TENURED
Special
APPRAISAL OF TEACHER SERVICE
OMAHA PUBLIC SCHOOLS

(12)

Name Tom Tenure School Taylor
Grade/Subject STh Date 2-28-85

Summary of Appraisal

I. PROFESSIONAL COMPETENCIES (Check x)

	Outstanding	Satisfactory	Unsatisfactory	Not Appraised
A. Ethical Behavior	X			
B. Rapport with Students		X		
C. Rapport with Parents		X		
D. Rapport with Professional Associates	X			
E. Professional Improvement		X		
F. Decision Making			X	
G. Reports and Records	X			
H. Knowledge of Subject Matter		X		
I. Communicative Skills		X		

II. TEACHING PERFORMANCE AND CLASSROOM MANAGEMENT (Check x)

A. Teaching Techniques			X		
B. Classroom Organization					X
C. Out-of-Class Responsibilities	X				
D. Lesson Plans and Goals					X
E. Classroom Atmosphere					X
F. Knowledge of Students					X
G. Student Involvement		X			
H. Respect		X			

III. PERSONAL QUALITIES (Check x)

A. Appearance		X				
B. Demeanor			X			
C. Dependability	X					
D. Tactfulness					X	
E. Attitude Toward Constructive Criticism			X	X		
F. Cooperation			X			
G. Health	X					
H. Punctuality	X					
I. Enthusiasm			X			
J. Judgment					X	
K. Loyalty		X				

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Yellow: Principal's Copy
Pink: Teacher's Copy

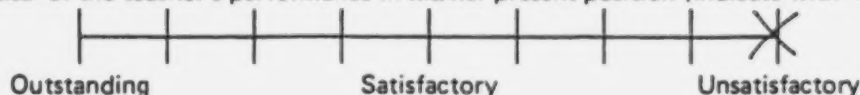
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Form B
Page 2 of 2 pages

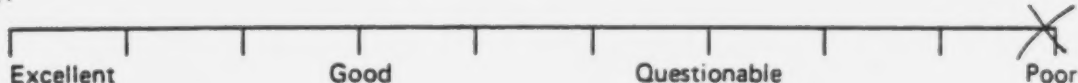
Overall Professional Appraisal

Omaha Public Schools

General appraisal of the teacher's performance in his/her present position (indicate with x):



I feel the possibility of this teacher meeting standards acceptable to the Board of Education is (indicate with x):



Comments: Despite significant effort by me and by Mr. Tenure's supervisor, the quality of Mr. Tenure's teaching has continued to deteriorate significantly. He is extremely disorganized, has made no effort to work out lesson plans and goals and there is no real learning going on in his classroom. He has made no effort to get to know his students this year and his classes are generally loud and boisterous. On several occasions he has exercised extremely poor judgment in disciplining youngsters.

This appraisal is based on the following formal visits, observations and/or conferences, as well as other informal observations and conferences:

<u>Date</u>	<u>Appraiser</u>	<u>Location</u>	<u>Length of Visit</u>
9/24/84	S.N. Nonsense	Classroom	45 minutes
10/7/84	S.N. Nonsense	Classroom	45 minutes
10/25/84	P. Supervisor	Classroom	60 minutes
11/15/84	S.N. Nonsense	Classroom	45 minutes
12/12/84	P. Supervisor	Classroom	45 minutes
1/8/85	S.N. Nonsense	Classroom	60 minutes
1/20/85	P. Supervisor	Classroom	45 minutes

I have read this appraisal and had opportunity to discuss it with the principal. My comments are:

Signature of Teacher

Date

Signature of Principal

Date

White - Personnel Department
Yellow - Principal's Copy
Pink - Teacher's Copy

Sally No Nonsense 2-25-85

125

June 19, 1984

Ms. Priscilla Probie
2626 Wrong Way
Omaha, Nebraska 68175

Letter Specifying Reasons for
Non-renewal of Probationary Teacher

Dear Ms. Probie:

I am writing in response to your letter of June 7, 1984, requesting a written specification of the reasons for the non-renewal of your teaching contract and also requesting copies of the contents of your personnel file and the names of any witnesses who will appear against you at the hearing.

The educationally related reasons for the non-renewal of your teaching contract are as follows:

1. Less than satisfactory performance regarding teaching techniques. Reports from administrative supervisory personnel reflect this as a major concern, as it relates to a need to be able to select alternate plans, procedures, and programs when a lesson does not develop as designed.

4/10/84 - Observation log indicates failure to adjust to an appropriate instructional approach led to classroom confusion and students not being on task.

11/09/83 - Observation log reflects failure to adopt an alternative instructional plan created an atmosphere of confusion and chaos.

As cited on 5/2/84 observation log, the learning experiences planned to meet the lesson objectives were ineffective, resulting in little challenge to students and poor motivation. As cited on 1/4/84 observation log, no introductory review of lesson objectives was given and instructional methods resulted in confusion on the part of the students.

2. Less than satisfactory performance as it relates to knowledge of subject matter. A major concern as it relates to teaching effectiveness is the need for you to improve subject area

knowledge. Depth and breadth in knowledge of language, literature and composition is a concern.

5/2/84 - Observation log indicates the lesson and related activities resulted in minimal learning, excessive off-task behavior and student boredom.

3. Less than satisfactory performance as it relates to knowledge of students. Classes have been observed where there is a noticeable difference between teacher and student - the distance concerns your overall demeanor which was seen as sending mixed signals to students (example; if students have been organized for an informal activity, then discipline measures should be adjusted so that confrontations over appropriate behavior can be avoided.)

As cited on 1/4/84 observation log, many students were not prepared for class with textbooks and completed homework assignments. It was obvious the assignment did not appropriately challenge these students. Further, it was not recognized that the use of verbal praise and encouragement would have served as a great motivator to these youngsters.

As cited on 5/2/84 observation log, the majority of students in the classroom had not selected a topic to research for a report in the prescribed time. Through understanding these students abilities and motivation levels, other activities might have been planned to eliminate loss of time.

4/10/84 - Observation log indicates lack of knowledge of individual students' learning levels created a situation where 98% of your class was not being challenged.

4. Less than satisfactory performance regarding communication skills. (Observation logs 5/2/84 and 10/17/83) Students have difficulty identifying with you as a person and as a teacher. Observations reveal no personal anecdotes which might reveal something of personal feelings regarding the topics under discussion.

Observation log dated 4/10/84 indicates lack of clear and precise direction created a disorganized classroom climate, task confusion and a loss of valuable teaching time.

5. Less than satisfactory demeanor in the classroom.

As cited on 4/3/84 observation log, you must continue to analyze your delivery and attempt to be more relaxed and casual in presentations.

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6. Less than satisfactory performance as it relates to judgment.

As cited on 1/4/84 observation log, routines had not been appropriately established at the beginning of class to promote a positive learning environment.

As cited on 5/2/84 observation log, the lesson was poorly planned with insufficient resource materials for students and no plans for students to use the library as needed.

You have also requested a list of possible witnesses who may appear to testify in support of the administration's recommendation of non-renewal. Although you have no statutory right to receiving such a list, I, nonetheless, am hereby informing you the following individuals may testify in support of the administration at the hearing.

1. Victoria Principal
2. Miami Vice Principal
3. Super Supervisor
4. Timely Supervisor
5. Ron Anderson

You have also requested copies of the contents of your personnel file and other documentation which might be used to substantiate the allegations regarding your work. You have reviewed the contents of your file on June 15, 1984. That personnel file is available to you during regular office hours should you once again desire to review the total contents of that file. Although you have no statutory right to receive advance notice of documents to be used by this office at the hearing, I have enclosed copies of information from the file related to this situation which will be used at the hearing. If any additional documentation is to be used at the hearing, you will be contacted immediately and notified in advance of the hearing regarding the additional documentation.

Please contact the Department of Staff Personnel Services should you have further questions or comments.

Sincerely,

Ron Anderson

Ron Anderson
Assistant Superintendent

Enclosures

(33)

OBSERVATION LOG
Department of Staff Personnel
Owens Public Schools.

Teacher: Priscilla Probie Observer: M. Vice Principal
Date: 11/9/83 Time: 9:30 Location: Classroom Subject: Gen. English
Length of Observation: 35 Minutes

General Observations and Comments:

Ms. Probie quickly began discussion of a previous reading assignment. The discussion centered around recalling situations from episodes of a story previously read. As the discussion progressed it became quite obvious that only a few out of the 25 students had read this assignment and were prepared.

She then moved from this task and directed her students to silently read another story at their desks. The students were quiet and went about this reading activity very eagerly. She then began to ask leading questions from the text book. There was a much broader discussion by the class during this activity.

It should be obvious that readiness and preparation are prerequisites for meaningful classroom discussion, especially when students are expected to exchange ideas and opinions.

As a result of approximately 2/3 of the class not being prepared, the teaching task degenerated from a sharing of information among students to that of a lecture.

A few helpful tips should assist you in your effort to improve:

1. Make every attempt to call on every student for a response. (This will perhaps embarrass some, however, it will put them on alert for future classroom discussions).
2. Before proceeding to assign a following reading task, you may try prefacing it with certain leading questions. Example: Give the subject and name of story, etc.
 - a. What do you expect this story will be about?
 - b. Where does it happen (geographically)? Why?
 - c. Who gets what and why?

Of course, these are vague questions, but you can refine them in relation to the events reflected in the story.

Sometimes, these activities serve as motivators and will heighten interest and reinforce students' reading habits.

Signature of Teacher (Optional)

Signature of Observer

White: Principal's Copy
Yellow: To/From _____ Copy
Pink: Teacher's Copy

129

Date Given to Teacher

23

OBSERVATION LOG
Department of Staff Personnel
Omaha Public Schools

Teacher: Priscilla Probie Observer: Victoria Principal
Date: 1/4/84 Time: 12:35-1:10 Location: Classroom Subject: Acad. English
Length of Observation: 35 Minutes

General Observations and Comments:

As I entered the room there was a great deal of student interaction. The way the class begins sets the tempo for the day. The routine for students should be to enter quietly and prepare for the class - give directions on the board, if necessary.

Ms. Probie settled students down, then reviewed the prologue of a play. After the definition of a prologue was given, the reading assignment from Romeo and Juliet was discussed. Ms. Probie was very knowledgeable of the play and well prepared for the discussion. There was some confusion on the part of students, however, regarding the need to take notes on the discussion. This was not clearly stated at the beginning of the lesson. Ms. Probie's introductory comments were made quite quickly - It would help understanding and organization if expectations and directions were given a little slower.

Some oral reading of the play was done. Students responded well and were most attentive during the reading. The homework questions from the previous day's lesson were then discussed.

Positive Practices Observed:

1. Ms. Probie was well prepared for the discussion.
2. Ms. Probie moved about the classroom throughout the lesson.
3. A variety of activities were utilized - questioning, discussion, oral reading and review of homework questions.

Suggestions:

1. Objectives for the day and directions should be clearly explained prior to the beginning of the lesson.
2. Ms. Probie moved very rapidly through the discussion. So much so that comprehension and understanding of the material was very likely not as great as it could be. Comprehension will be increased through a slower pace.
3. Not all students were prepared for the class - some had forgotten texts and had not read assignment or completed the homework. Steps should be taken to provide all students with texts. Comprehension checks should also be made.

Signature of Teacher (Optional)

Signature of Observer

White: Principal's Copy

Yellow: To/From _____ Copy

Pink: Teacher's Copy

Date Given to Teacher

A-130

OBSERVATION LOG
Department of Staff Personnel
Omaha Public Schools

24

Teacher: Priscilla Probie Observer: Victoria Principal
Date: 1/4/84 Time: 12:35-1:10 Location: Classroom Subject: Acad. English
Length of Observation: 35 Minutes

PAGE 2

General Observations and Comments:

4. The routine at the beginning of class was not firmly established and conducive to a positive learning environment. Students should have an activity on which to begin work immediately.
5. Try to modulate your voice to a greater degree. This helps emphasize important tasks as well as helps maintain student interest.
6. Make use of verbal praise whenever appropriate. Reinforce correct responses and behaviors. This is a great motivator.

Signature of Teacher (Optional)

Signature of Observer

White: Principal's Copy
Yellow: To/From _____ Copy
Pink: Teacher's Copy

Date Given to Teacher

131

25

Teacher: Priscilla Probie Observer: M. Vice Principal
Date: 4/10/84 Time: 9:30 Location: Classroom Subject: Gen. English
Length of Observation: 30 Minutes

General Observations and Comments:

Ms. Probie began this presentation with a discussion of the three parts of a sentence. She asked the class two lead-in questions.

- 1) What is a fragment sentence.
- 2) What is a run-on sentence.

She then used the overhead projector to review definitions of various sentences. After a brief discussion, she gave directions for the day's assigned tasks. The students were required to:

- 1) Identify various fragments.
- 2) Connect fragments to sentences by leaving out or adding words.

The students appeared confused and not sure of their task. Ms. Probie quickly recognized this and began to give helpful remedial exercises. She proceeded to re-teach several of the pre-requisite skills that students should have mastered before attempting the assigned task.

After carefully explaining how to identify fragment and complete sentences, several of these students began to respond quite positively.

This was obviously a very difficult and frustrating exercise. Students seemed interested but had not been prepared to handle this assignment. It appeared that approximately 25 understood what was expected or gained any useful information from this exercise.

COMMENTS

Writing is a critical skill area and one from which we must remove deficiencies that exist among many of our students.

In order for these students to show improvement in their ability to write effectively, they must master tasks designed to strengthen those deficiencies. Hopefully, through such exercises that were included in your teaching plans, this will happen. It is extremely important that they master the initial task of understanding differences between a run-on fragment and a complete sentence.

The oral reading of these sentences from the textbook probably was helpful. Perhaps, had you required the students to write out these sentences using their

Signature of Teacher (Optional)

Signature of Observer

White: *Principal's Copy*

Yellow: *To/From* _____ *Copy*

Pink: *Teacher's Copy*

Date Given to Teacher

132

OBSERVATION LOG
Department of Staff Personnel
Omaha Public Schools

26

Teacher: Priscilla Probie Observer: M. Vice Principal
Date: 4/10/84 Time: 9:30 Location: Classroom Subject: Gen. English
Length of Observation: 30 Minutes

General Observations and Comments: (PAGE 2)

pencil and paper as a written exercise, the concept would have been reinforced thereby adding to their retention. It is a proven fact that improvement in a student's ability to write comes only through repetition (writing, writing and rewriting). Many students will reject this and not react favorably to you for having them go through these kinds of writing exercises but, in the long run, you will experience a favorable change in their writing style and a better use of the mechanics needed for improvement in this area.

Your use of the overhead in defining parts of sentences was excellent. However, had you written out two or more sentences from Exercise 3, pp. 209-210, Sentence Fragments, either using the overhead or blackboard, I believe the effectiveness of this presentation would have had a more profound impact on these students.

Students were much more responsive when they were given a worksheet to complete. This was a good climax for your planned activity.

Signature of Teacher (Optional)

Signature of Observer

White: Principal's Copy
Yellow: To/From _____ Copy
Pink: Teacher's Copy

Date Given to Teacher

133

OBSERVATION LOG
Department of Staff Personnel
Omaha Public Schools

27

Teacher: Priscilla Probie Observer: Victoria Principal
Date: 5/2/84 Time: 12:45 Location: Classroom Subject: 9th English
Length of Observation: 25 Minutes

General Observations and Comments:

Ms. Probie was in the process of explaining the requirements of an informative report which students were to prepare and recite orally on Monday. Students were asked if they had selected their topic area. A few indicated they had but the majority had not done so. Therefore, Ms. Probie indicated time would be provided for students to select their topic area. Four of the students who had identified a topic were permitted to go to the library to do research work. However, while Ms. Probie prepared their pass, the entire class waited, resulting in approximately two minutes of off-task behavior for everyone.

For the remainder of the period, students reviewed materials for a topic area. At approximately two o'clock, several students asked to go to the library but were unable to do so as the others had not yet returned. They were directed to review the guidelines for the assignment instead. Several other students still had not identified an area. Ms. Probie repeatedly questioned and prodded them about their progress.

It appeared that an inordinate amount of time was being spent on a task which might more appropriately have been completed as homework prior to the class. It should also have been anticipated that more than four students would have need to use the library.

Perhaps a listing of topic areas should have been provided for students to expedite topic selection. A deadline should also have been set for selecting a topic. Further, arrangements should have been made for the entire class to use the library or research materials should have been provided in the classroom. This would have eliminated the loss of valuable class time which resulted.

It is important that such a project be well organized and potential problem areas planned for in advance. Otherwise, the "process" more than the "product" becomes the main thrust of the lesson.

Signature of Teacher (Optional)

Signature of Observer

White: Principal's Copy
Yellow: To/From _____ Copy
Pink: Teacher's Copy

Date Given to Teacher

134

**GUIDE
FOR
THE
EVALUATION
OF
INSTRUCTIONAL STAFF MEMBERS
IN THE
OMAHA PUBLIC SCHOOLS**

August, 1986

P-37

Item No. 1380442

28150-89876

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FOREWORD

The Omaha Public Schools must select, develop and retain the finest teachers to work with students in the School District of Omaha. The instructional performance, classroom management, and professional and personal qualities of a teacher are areas to be appraised carefully if this standard is to be retained.

This *Guide for the Evaluation of Instructional Staff Members in the Omaha Public Schools* is the result of the efforts of the Superintendent's Personnel Advisory Committee which was composed of teachers, supervisors and administrators. Pilot school participants also provided ideas and suggestions.

This evaluation process has been designed primarily to improve the quality of teaching. It includes the following elements: (1) the identification of specific goals, (2) self-analysis by each teacher, (3) an explanation of the process to the teacher before evaluation, (4) classroom observation as a key element in determining effective teaching, (5) personal conferences to clarify and to analyze instruction, and (6) an evaluation summary which becomes a part of the staff member's personnel file.

Each person involved in the evaluation process must understand the continuing demands placed on schools by this community. Therefore, all involved will need to make the evaluation process a priority. A top-notch evaluation system is a must if we are to continue our commitment to improve the academic achievement of all students in our school district. Students will learn more if we, as teachers and administrators, make conscious efforts to improve our performance.

Norbert J. Schuerman
Superintendent of Schools

Acknowledgements

During the 1983-84 and 1984-85 school years, the Superintendent's Personnel Advisory Committee reviewed and revised the system for evaluating the performance of instructional staff members. The resulting program was piloted in the schools listed below during the 1985-86 school year. This evaluation guide reflects the work of the committee and the pilot schools.

Pilot Schools:

Bancroft Elementary School	Bryan Junior High School
Benson West Elementary School	Mann 9th Grade Center
Catlin Elementary School	Monroe Junior High School
Dundee Elementary School	Morton Junior High School
Gilder Elementary School	Norris Junior High School
Harrison Elementary School	Bryan High School
Highland Elementary School	Burke High School
King Magnet School	Central High School
Pinewood Elementary School	

Superintendent's Personnel Advisory Committee:

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Robert Cain	Stan Lammers
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Lorraine Giles	Jolene Pace
Phil Gradoville	Robert Schultze
Ann Grill	Theresa Sykes
Sandra McGee	Ron Anderson
Tom Jodlowski	

Writing Committee:

Joan Gayle Chapin
Robert Jorgensen
Sharon Kelly
Rose Mary Moore

SUGGESTED TIME TABLE

SEPTEMBER: 1 Informal
Goals

OCTOBER: 1 Informal
1 Formal

NOVEMBER: 1 Formal
Planning and Materials

**DECEMBER/
JANUARY:** 1 Informal
1 Formal

FEBRUARY: Activity Record
Evaluation Summary

MARCH:

APRIL:

MAY: Goals Comment

I. INTRODUCTION

"There is no area in education that has more potential impact on the improvement of instruction and hence on the improvement of schools than a successful teacher evaluation system."

— Rand Report, *Teacher Evaluation: A Study of Practices*, 1984

This statement reflects the renewed focus throughout the nation on teaching as the key to quality education and on teacher evaluation as an effective way to promote quality teaching.

The success of any evaluation system depends on the attitude of the people involved. Research and experience indicate that a positive working relationship between an administrator serving as an instructional leader and a teacher committed to quality education is the most important element in improving instruction. This system builds on a relationship of mutual trust and respect. It incorporates interaction between staff members and evaluators who complete the evaluation in a cooperative manner — sharing their perceptions and insights, offering and testing suggestions.

Evaluation generally serves two basic purposes: accountability and improvement of instruction. In this system some evaluation activities address accountability through district-wide standards of performance, while others focus on individualized improvement through goal setting and conferences.

This evaluation system attempts to recognize both the high degree of professionalism in the Omaha Public Schools and the complexity of teaching itself. Teaching involves a multitude of styles and techniques applied to constantly changing conditions. Each class has different dynamics; each day has new challenges. There are many variables in successful teaching — some of them intangible, many of them subjective. Classroom visits alone do not provide a full view of a teacher's talents and techniques. Therefore, evaluation includes much more than observations.

Teachers are more actively involved in the evaluation process through goal setting and conference participation. Conferences are intended to generate more frequent communication and feedback concerning classroom practices. The overall outcome can be individualized, teacher-directed improvement.

A key obstacle to effective evaluation is time. Evaluation is easily sacrificed to more seemingly urgent demands and responsibilities. But time is also the main resource of effective evaluation. Careful time management and continued district support of evaluation as a priority create that resource.

This evaluation system illustrates the district's commitment to quality education. This process challenges and assists both teachers and administrators to grow as professionals.

II. EVALUATION PURPOSES

Listed below are the four major instructional purposes of the evaluation process and related purposes which evaluation also serves:

To improve instruction.

- To increase communication between teachers, administrators, and supervisors.

- To define standards of performance.

- To promote continual professional development.

- To assist in evaluating the district's recruitment and selection process.

To recognize quality teaching.

- To provide information to award tenure.

- To assist in assigning staff members within the school district.

- To identify potential leaders.

- To identify the ability to make special contributions.

To identify and assist teachers having difficulty.

- To identify staff development needs.

To identify incompetent teaching.

- To provide due process in contract renewal or termination.

III. EVALUATION PARTICIPANTS AND THEIR ROLES

Successful evaluation is a cooperative venture involving teachers, supervisors, and administrators working toward the common goal of improved instruction. Each of the participants has an important role to play, and each brings different skills and experiences to the process.

(Throughout this guide, the term *administrators* refers to principal or assistant principal. *Supervisor* refers to curriculum supervisor, department head or curriculum specialist. *Teachers* refers to counselor, special area teacher or classroom teacher.)

A. Teachers

Teachers are the focus of the evaluation process. Since the purpose of improved instruction is a continuous goal, all teachers will be involved in some components of the process every year. Non-tenured teachers will complete the evaluation cycle annually; tenured teachers will complete the cycle over a three year period. This schedule recognizes that non-tenured teachers may be inexperienced and are new to the expectations and procedures of the Omaha Public Schools. The tenured teachers' three-year cycle follows school board policy and state regulations.

Responsibilities of the teacher in the evaluation process include the following:

1. To write specific goals to improve teaching and learning.
2. To participate in the observations and conferences.
3. To analyze personal teaching strengths and weaknesses, to seek assistance when needed and to accept constructive suggestions.

B. Principals

As the instructional leader of the school, the principal has the ultimate responsibility for evaluation. Depending on the number of teachers to be evaluated and the responsibilities and demands of individual schools, the principal may delegate some of the evaluation activities to assistant principals and department heads. Their participation brings additional viewpoints and skills to the process.

Responsibilities of the principal in the evaluation process include the following:

1. To organize and schedule the evaluation procedures for the school.
2. To keep accurate and complete records on the performance of each staff member.
3. To assist in goal setting.
4. To observe and conference.
5. To offer suggestions to improve instruction.
6. To complete the Evaluation Summary, discuss it with the staff member and submit it to the Personnel Office.
7. To initiate and implement the intervention process when necessary.

C. Supervisors

The supervisor brings to the evaluation process subject area or grade-level expertise and an overview of district curriculum.

Responsibilities of the supervisor in the evaluation process include the following:

1. To schedule observations and conferences in consultation with the principal.
2. To observe and conference.
3. To offer suggestions to improve instruction.
4. To serve as a resource and provide assistance in subject matter development and teaching techniques.
5. To communicate observed teaching strengths and weaknesses to the principal.
6. To assist in the intervention process when necessary.

IV. EVALUATION PROCESS

This section describes the components, procedures, forms and timelines for the evaluation of instructional staff members.

The evaluation system has seven components:

- Performance Goals Plan
- Informal Classroom Observation
- Formal Classroom Observation and Conference
- Planning and Teaching Materials Evaluation
- Activity Record
- Evaluation Summary
- Intervention

EVALUATION PROCESS OVERVIEW

The number of observations and reports scheduled for each component is the minimum required.

COMPONENT	FORM	NON-TENURED TEACHER SCHEDULE	TENURED TEACHER SCHEDULE
Performance Goals Plan	A	Fall	Fall
Written Informal Classroom Observation	C	3 each year 1 in Sept. 2 nd Oct - Feb	1 each year
Formal Classroom Observation and Conference	C-D	3 each year Oct - Feb Usually one month apart	3 during 3 year cycle Recommended annually or at least 30 days apart
Pre-Observation Information	B	Announced observation	Announced observation
Planning and Teaching Materials Evaluation	C	1st semester	Planning Evaluation — Annually Materials Evaluation — Optional
Activity Record	E	Annually Before Evaluation Summary is written	Annually Before Evaluation Summary is written
Evaluation Summary	F	1 each year Before 2nd week in March Additional if necessary	1 each 3 year cycle Before April 1 in 3rd year of evaluation
Intervention		As needed	As needed

A. Performance Goals

Since improvement of instruction is a major purpose of evaluation, all teachers will write performance goals each year. This activity is the beginning of the evaluation process. Here the teacher focuses on self-improvement by identifying specific performance-related skills to improve teaching and learning.

There are four basic types of goals. Only teaching and learning goals are appropriate performance goals because they relate directly to the improvement of instruction. Program goals involve curriculum development, so they are reported on the Activity Record. Organizational goals involve routine expectations and are assigned by the principal when needed.

Goal Types:

1. **Teaching goals** focus specifically on the teacher's performance. These goals deal most directly with teaching skills and techniques; therefore, they have a direct impact on student learning. Also, new or refined teaching skills stay with a teacher beyond a change in students or subject matter.

Samples:

To alter my questioning style for the different ability levels in my class.

To use a variety of teaching methods to increase student interest.

2. **Learning goals** focus on measurable or observable student improvement. These goals are directed to a specific situation or group of students; therefore, they also have a direct impact on increased student achievement.

Samples:

At least 90% of the students in my middle reading group will advance one grade level from September to May.

Students will begin their essays with creative introductions.

3. **Program goals** focus on curriculum areas. (e.g. To revise the Contemporary American Writers Unit for my advanced literature class.) These goals are important but are more appropriately pursued outside of the evaluation process in activities such as curriculum committees and department meetings. Report these achievements on the Activity Report instead of listing them as performance goals.
4. **Administrative goals** focus on out-of-class routine or policy. (e.g. To complete reports accurately and on time.) Administrative goals are low priority goals for most teachers because they relate to minimal expectations rather than cooperative instructional improvement. If included, these goals would be proposed by the principal rather than the teacher.

Since the purpose of goal-setting is to improve, a performance goal might involve an area needing refinement. But it could also be an area of interest, a challenge, or a new or different approach. One meaningful goal is sufficient; more than three goals are too many to work on in this process.

This is the procedure for recording and evaluating goals:

1. Each fall, teachers list their performance goals on the Performance Goals Plan form. (Teachers may wish to write a draft of their goals for approval before completing the actual form.)
2. Along with each goal, teachers list planned activities to achieve the goal and propose methods to evaluate their progress. So as not to eliminate worthwhile goals which are not concretely measurable, subjective judgments by supervisors and teachers are acceptable measures of goal achievement.

Sample Activity:

To use the following media in science lessons: over-head projector, computer, film strip and newspaper.

Sample Evaluation Method:

Discuss media effectiveness in each post-observation conference.

3. The teacher and the principal both initial the form in the fall to indicate mutual acceptance of the goals plan. The principal keeps the third copy at that time, and the teacher retains the other copies.
4. When goals have been achieved, or at the end of the school year, the teacher analyzes goal progress on the self-evaluation section of the form.
5. An administrator also writes a comment on the goal form about some aspect of the goal process — the goals themselves, the teacher's progress as observed or as reported by the teacher, suggestions for future goals or approaches.
6. Both teacher and principal sign the completed form. The principal keeps the original; the teacher retains the copy.

7. A summary comment by the principal about goal progress is part of the Evaluation Summary. (For the tenured teacher this comment would reflect three years' goals.)

The Performance Goals Plan will be used throughout the evaluation process. Teachers may ask observers to look for goal-related techniques or activities during their classroom visits. Teachers and observers may discuss goal progress during conferences. Copies of the goals may be given to department heads, supervisors, and other members of the evaluation team, so they are all aware of the teacher's chosen focus for improvement for the year.

B. Informal Classroom Observation

Informal classroom observations are brief (2-10 minutes), unannounced classroom visits. Informal observations allow supervisors and administrators to drop in on all teachers to note their daily performance. They also allow those observers to become more visible and familiar in the classroom — thus making formal observations less disruptive to normal class routine.

It is expected that informal classroom observations will be frequent and routine. A written record is not required for all such visits. When desired, the observer can use the Observation Record to document an informal observation with a brief written comment which might note a compliment or express a concern.

The minimum number of informal classroom observations to be recorded on the Observation Record is as follows:

Non-tenured teachers — 3 each year
1 in September
2 between October and February

Tenured teachers — 1 each year

Although informal observations are intended to focus on classroom performance, administrators or supervisors may record comments on out-of-class performance on the same form by checking "other" and listing the non-class setting or situation along with their comments.

C. Formal Classroom Observation

Formal classroom observations are longer (30 minutes minimum) classroom visits which are followed by conferences between the observer and the teacher. Non-tenured teachers have at least three formal observations each year; tenured teachers have at least three formal observations over a three year period. At least one of the three formal observations is pre-arranged.

The purposes of formal classroom observation include the following:

- To identify areas of strength for reinforcement
- To identify areas in need of refinement or improvement
- To gather information on performance goals
- To provide information on teaching effectiveness for the Evaluation Summary

Each formal observation includes a classroom observation and an post-observation conference. Announced formal observations also include pre-observation information.

Pre-Observation Information

When the formal observation is pre-arranged, the teacher fills out the Pre-Observation Information form. Through this form, the teacher sets up the lesson for the observer and may direct the observer to focus on a particular skill or activity. The teacher has the opportunity to alert the observer to specific concerns or questions about the class to be observed. With that information, the observer can be a helpful resource to the teacher as well as an evaluator of teacher performance. The form is given to the observer before class. Either observer or teacher may request a pre-observation conference to discuss the lesson to be observed.

Classroom Observation

Classroom observation is a key element in determining teacher effectiveness and is an essential element in assisting a teacher to improve teaching skills. The observer completes the Observation Record by writing an objective summary which describes what occurred during the lesson. The observer uses this information to plan the follow-up conference.

Post-Observation Conference

Soon after the observation, the teacher and observer meet to analyze the lesson and discuss future strategies. This is also an opportunity to review performance goal progress. It is important that the teacher take an active role in this conference, giving as well as receiving information. The teacher and evaluator discuss what was observed and then make judgments about the effectiveness of the lesson. This conference should contain the following parts:

- self-analysis of the lesson by the teacher
- reinforcement of observed strengths by the observer
- suggestions of areas needing refinement and methods by which to improve.

After the conference, the observer completes the Post-Observation Conference Summary form as a record of the discussion. While the Observation Record is an objective description, the Conference Summary will contain conclusions and judgments reached in the conference by both teacher and observer about the strengths and weaknesses of the lesson. It will also include constructive suggestions.

A combination of announced and unannounced formal observations, spaced between October and March, at different times of the day, should provide an overview of a teacher's classroom skills. The minimum number of formal classroom observations is listed below:

Non-tenured teachers — 3 each year (October — February)
1 announced
2 unannounced

Tenured teachers — 3 during the 3 year cycle
1 announced
2 unannounced

D. Planning and Teaching Materials Evaluation

Planning materials include long-range instructional goals, short-range learning objectives, and daily lesson plans.

Teaching materials include instructional aids such as study guides, work sheets, assignments sheets, project guides, audio visual aids, quizzes, and tests.

Planning and materials evaluation is a scheduled part of the evaluation process for non-tenured teachers. During the first semester, the supervisor reviews a teaching unit of materials and plans compiled by the teacher. Together the teacher and supervisor discuss and analyze the materials. This critique provides another opportunity for instruction-centered communication. The supervisor uses the Observation Record to summarize this conference.

Supervisors review tenured teachers' planning materials annually and record comments on the Observation Record. Teaching materials evaluation may also be brought into the evaluation process for tenured teachers at their or the evaluator's request.

E. Activity Record

Each year all teachers list their professional development activities on the Activity Record so the principal can be aware of and consider that information before writing the Evaluation Summary.

F. Evaluation Summary

The culmination of the evaluation process is the Evaluation Summary — the formal review of the teacher's performance. The principal completes the Evaluation Summary form incorporating all the observations, conferences, information, and interactions between the teacher and all the administrators and supervisors who have participated throughout the evaluation period.

The Evaluation Summary is structured around the performance standards — those skills and qualities required of teachers in the Omaha Public Schools. The performance standards are divided into four categories which follow the State Department of Education guidelines:

- Instructional Performance
- Classroom Management and Learning Environment
- Professional Qualities
- Personal Qualities

The principal indicates the teacher's overall performance level in each of the four categories. There are two performance levels: Satisfactory and Unsatisfactory.

As a ranking, Satisfactory (S) denotes competence: the teacher meets or exceeds district expectations.

As a ranking, Unsatisfactory (U) denotes incompetence: the teacher does not meet district expectations.

The principal marks the teacher's overall performance level in each of the four categories with an S or a U in the performance level box. The category ranking is derived from the performance standards within that category. Skills and qualities which define each performance standard are listed in the appendix and on the back of the Evaluation Summary. The principal marks the teacher's performance level on each standard. An additional level of performance may be indicated here for the teacher who is deficient but close to meeting minimum standards of the district and needs to improve a particular skill. This level of performance is indicated by the ranking Needs Improvement (N). An N on a performance standard may or may not result in informal intervention. (An N may be used only on the performance standards level.)

MARKING SAMPLE

(category)	1. Instructional Performance	Performance Level	□ (Mark S or U)
(performance standards) (skills or qualities)	A. Knowledge of Subject Matter 1. Has a thorough understanding of subject matter	____ (Mark S, N or U)	
(performance standards) (skills or qualities)	2. Is able to communicate that knowledge effectively		
	B. Planning 1. Follows established district curriculum 2. Writes long-range, unit, and daily plans	____ (Mark S, N or U)	

After ranking the individual performance standards, the principal marks the category. There is no formula which calculates the marking of the category. A teacher may receive one or more U's on the performance standard level, and still receive an S for the category. Or a teacher might receive only one U on the performance standards and receive a U in the category. The principal must make a judgment on an individual basis, weighing the importance of the standard with the extent of the teacher's weakness in that area. A category ranking of U results in formal intervention.

A comment section for each category provides an opportunity for the principal to compliment strengths or note weaknesses. The Evaluation Summary also contains a section in which the principal reviews the teacher's progress on the performance goals throughout the evaluation period. The summary comment section can be used to recommend contract renewal or to record the teacher's overall contribution.

After completing the Evaluation Summary, the principal meets with the teacher to highlight successes, review progress, discuss areas which need improvement, and suggest new directions for the coming year.

Ordinarily, the principal completes an Evaluation Summary each spring for both non-tenured teachers and tenured teachers in the third year of evaluation. But a principal may write an Evaluation Summary at any time in connection with the intervention process. The Evaluation Summary schedule is listed below:

Non-tenured teachers

1 each year before the 2nd week in March
or as needed

Tenured teachers

1 by April 1 in the third year of the evaluation cycle
or as needed

G. Intervention Process

This process is designed to assist a teacher who is not performing at a satisfactory level. It is conducted by the principal. In most situations it has two stages:

1. Informal Intervention

At any time severe deficiencies are noted, observations and conferences are increased. If problems continue, an informal intervention conference is held. Here the principal gives the teacher notice of being placed on informal intervention. The principal outlines the following areas for the teacher and records them in a written summary of this conference:

deficiencies
desired behavior
assistance which will be offered
intervention procedures
time frame for improvement

During the informal intervention period, there will be increased observations and conferences. After 4-6 weeks in this status, a decision is made by the principal to continue informal intervention status, or to move to formal intervention. The Evaluation Summary is completed if the teacher is to be placed on formal intervention; it may be completed if the teacher remains on informal intervention; it need not be completed to return the teacher to non-intervention status.

2. Formal Intervention

Ordinarily a teacher has been on informal intervention before receiving an Unsatisfactory on any category of the Evaluation Summary. Upon receipt of that Unsatisfactory, the teacher is placed on formal intervention.

The goal of intervention is to help a teacher having difficulty gain or regain professional competence. Formal intervention is structured by the individualized performance improvement plan which states specific deficiencies and outlines assistance and evaluation procedures.

Administrators may be assisted by a team in the intervention process. An administrator from the Personnel Office convenes the team and explains the procedures necessary to satisfy due process requirements. The principal leads the observation team and writes the Evaluation Summary. Supervisors, assistant principals, and department heads may provide intervention assistance and conduct formal and informal observations.

The basic formal intervention procedures are as follows:

- Official notice of formal intervention status from the Personnel Department to the teacher and the principal.

- Performance improvement plan coordinated by the Personnel Department.

- Contents of the plan:

- specific performance deficiencies
 - improvement required
 - assistance to be provided
 - intervention team members (when appropriate) and their roles
 - intervention procedures
 - time line

- Performance improvement plan conference between the principal and the teacher

- Implementation of improvement plan

- Evaluation Summary

- Employment decision

PERFORMANCE GOALS PLAN
FORM A
Omaha Public Schools

STAFF MEMBER _____ SCHOOL _____ YEAR _____

List one to three teaching and learning goals agreed upon between the teacher and the administrator or supervisor

Goal:	Activities to Achieve Goal:	Methods to Evaluate Goal:
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Goal:	Activities to Achieve Goal:	Methods to Evaluate Goal:
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Initial Approval: Staff Member _____ Date _____ Administrator _____ Date _____

Progress Comments

Self Evaluation:

Administrator Comments:

Staff Member's Signature

Date

Administrator's Signature

Date

Performance Goals

There are four basic types of goals. Only teaching and learning goals are appropriate performance goals because they relate directly to the improvement of instruction. Program goals involve curriculum development, so they are reported on the Activity Record. Organizational goals involve routine expectations and are assigned by the principal when needed.

Goal Types:

1. **Teaching goals** focus specifically on the teacher's performance. These goals deal most directly with teaching skill and techniques; therefore, they have a direct impact on student learning. Also, new or refined teaching skills stay with a teacher beyond a change in students or subject matter.

Samples:

To alter my questioning style for the different ability levels in my class.

To use a variety of teaching methods to increase student interest.

2. **Learning goals** focus on measurable or observable student improvement. These goals are directed to a specific situation or group of students; therefore, they also have a direct impact on increased student achievement.

Samples:

At least 90% of the students in my middle reading group will advance one grade level from September to May.

Students will begin their essays with creative introductions.

SAMPLE

GOAL:	ACTIVITIES TO ACHIEVE GOAL:	METHODS TO EVALUATE GOAL:
Students in my sixth grade class who have not demonstrated proficiency of basic math facts in addition, subtraction, multiplication and division will demonstrate mastery by the end of the school year.	1. Regular but varied drill activities in the classroom. 2. Frequent math facts tests. Chart and reward progress. 3. Computer practice. 4. Student tutors. 5. Parent-student activities for drill at home.	1. Improved accuracy on math facts tests. 2. Increased fluency of math skills as observed by the teacher in daily lessons. 3. Demonstrated growth on the California Achievement Test.

PRE-OBSERVATION INFORMATION
FORM B
Omaha Public Schools

STAFF MEMBER _____ DATE OF OBSERVATION _____

OBSERVER _____ TIME OF OBSERVATION _____

This form is used for announced classroom observations. The teacher gives the completed form to the observer before the lesson. The teacher or observer may request a conference before the observation.

Unit of Study:

Lesson Objectives:

Teaching and Learning Activities:

Special Considerations:

Observer Focus: (Could include performance goal assistance)

Staff Member's Signature

Date

Observer's Signature

Date

OBSERVATION RECORD
FORM C
Omaha Public Schools

☐

Informal classroom
observation

☐

Formal classroom
observation
(Descriptive only)

☐

Other

STAFF MEMBER _____ OBSERVER _____ DATE _____

TIME _____ LENGTH OF OBSERVATION _____ LOCATION _____ SUBJECT AREA _____

A signature only indicates receipt of this form and is required only for formal classroom observations.

(Staff Member's Signature)

(Date)

(Observer's Signature)

(Date)

White — Observer's Copy
P-34

Yellow — Staff Member's Copy
Item No. 1380412

Pink — To/From _____ Copy
28147-89876

A-145

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POST-OBSERVATION CONFERENCE SUMMARY
FORM D
Omaha Public Schools

STAFF MEMBER _____ DATE OF CONFERENCE _____

OBSERVER _____

Summarize below the topics discussed by the staff and the observer. Include the following:

1. Self analysis of the lesson by the teacher
2. Areas of strength
3. Areas needing refinement or improvement and suggestions offered

Staff Member's Signature

Date

Observer's Signature

Date

ACTIVITY RECORD
FORM E
Omaha Public Schools

STAFF MEMBER _____ YEAR _____

List the activities you have participated in this year which have contributed to your professional development.

School Committees: _____

Volunteer School Activities: _____

Staff Development Activities: _____

Curriculum Development Activities: _____

Other: (College courses, conferences, travel, community work) _____

List the help you received this year which was valuable. _____

List additional help which you believe would improve your teaching. _____

Staff Member's Signature

Date

Observer's Signature

Date

ACTIVITY RECORD
FORM E
Omaha Public Schools

STAFF MEMBER _____ YEAR _____

List the activities you have participated in this year which have contributed to your professional development.

School Committees:

Volunteer School Activities:

Staff Development Activities:

Curriculum Development Activities:

Other: (College courses, conferences, travel, community work)

List the help you received this year which was valuable.

List additional help which you believe would improve your teaching.

Staff Member's Signature

Date

Observer's Signature

Date

White — Observer's Copy
P-33

Yellow — Staff Member's Copy
Item No. 1380402

Pink — To/From _____ Copy
28148-89876

**EVALUATION SUMMARY
FORM F
Omaha Public Schools**

STAFF MEMBER _____ **SCHOOL** _____

GRADE OR SUBJECT _____ **DATE** _____

Performance Levels

S — Satisfactory: Meets or exceeds the standards of the School District of Omaha.

N — Needs Improvement: Deficient but close to meeting minimum standards of the School District of Omaha.
Improvement is necessary.

U — Unsatisfactory: Does not meet the standards of the School District of Omaha.

I. Instruction Performance

**Performance
Level**

- | | |
|--|------------------------------|
| A. Knowledge of subject matter _____ | G. Teaching diversity _____ |
| B. Planning _____ | H. Learning diversity _____ |
| C. Instructional resources _____ | I. Learning techniques _____ |
| D. Teaching the lesson _____ | J. Motivation _____ |
| E. Communication _____ | K. Student involvement _____ |
| F. Instructional time management _____ | L. Student evaluation _____ |

☐

Comments:

II. Classroom Management and Learning Environment

**Performance
Level**

- | | |
|---|--------------------------------|
| A. Classroom procedures and rules _____ | D. Student relationship _____ |
| B. Discipline _____ | E. Creative _____ |
| C. Knowledge of students _____ | F. Classroom environment _____ |

☐

Comments:

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A-149

III. Professional Qualities**Performance
Level**

- | | | | |
|---|-------|-------------------------------------|-------|
| A. Rapport with students | _____ | G. Professional improvement | _____ |
| B. Rapport with parents | _____ | H. Cooperation | _____ |
| C. Rapport with professional associates | _____ | I. District policies and procedures | _____ |
| D. Communication skills | _____ | J. Record-keeping | _____ |
| E. Flexibility | _____ | K. Out-of-class responsibility | _____ |
| F. Sound judgment | _____ | L. Ethical behavior | _____ |

Comments:

IV. Personal Qualities**Performance
Level**

- | | | | |
|------------------|-------|---------------|-------|
| A. Dependability | _____ | D. Enthusiasm | _____ |
| B. Tack | _____ | E. Grooming | _____ |
| C. Demeanor | _____ | | |

Comments:

V. Goals Progress Comment:

VI. Summary Comment:

VII. Classroom Observation Record

Informal Observation			Formal Observation	
Date	Location	Observer	Date	Observer

VIII. Staff Member's Comments (optional)

I have read this Evaluation Summary and have had an opportunity to discuss it with the principal.

(A signature only indicates receipt of this Evaluation Summary.)

_____ Staff Member's Signature	_____ Date
_____ Principal's Signature	_____ Date

White — Personnel File
P-36 (Page 3)

Yellow — Principal's Copy
Item No. 1380432

Pink — Staff Member's Copy
28149-89876

OMAHA PUBLIC SCHOOLS
PERFORMANCE STANDARDS

There is no one best way to teach. But there are some basic behaviors and qualities that all competent teachers exhibit. While the following list is not all inclusive, it does contain the basic standards of practice expected of teachers in the Omaha Public Schools. These performance standards not only function as a basis of teacher evaluation, but also serve as a guide for self evaluation.

I. Instructional Performance

A. Knowledge of Subject Matter

1. Has a thorough understanding of the subject matter and remains current in its development.
2. Is able to communicate that knowledge effectively.

B. Planning

1. Follows established school district curriculum.
2. Writes long-range, unit, and detailed daily plans.
3. Provides comprehensive plans for a substitute.
4. Continually adjusts and updates planning in response to student performance.
5. Uses results from standardized and teacher-made tests to plan instruction.

C. Instructional Resources

1. Uses approved texts and supplementary materials.
2. Interprets and uses district test results.
3. Uses district instructional support staff and services.

D. Teaching the Lesson

The following are basic components of effective teaching. The techniques which are present and observable in a given class period are dependent on the current unit or lesson sequence.

1. Prepares thoroughly for each lesson.
2. Sequentially orders learning objectives.
3. Communicates the learning objectives and the rationale of the lesson to students.
4. Illustrates, demonstrates, explains or guides students to discover what is to be learned.
5. Checks for understanding.
6. Paces learning activities according to the needs of the students.
7. Provides appropriate teacher-led practice.
8. Provides for quality independent practice.
9. Assigns relevant homework.
10. Structures activities to provide closure and to evaluate learning.
11. Reviews relevant concepts.
12. Reteaches concepts when necessary.
13. Observes student performance during the lesson and adjusts teaching techniques accordingly.

E. Communication

1. Uses appropriate vocabulary, correct pronunciation and spelling.
2. Gives precise directions.
3. Explains assignments and standards for finished products clearly.
4. Answers students' questions appropriately.
5. Listens to students.

F. Instructional Time Management

1. Uses allocated class time for instruction.
2. Maintains a consistent pace.
3. Keeps students alert to the activity at hand.
4. Provides smooth transitions between different learning activities.

G. Teaching Diversity

1. Uses appropriate and varied methods and materials to reach students.
2. Modifies instruction in response to unexpected events.

H. Learning Diversity

1. Diagnoses the students' current learning levels.
2. Provides instruction at an appropriate level to reach individual students with different learning abilities.
3. Recognizes and provides for different learning styles.

I. Learning Techniques

1. Helps students develop efficient work habits and effective study skills.
2. Emphasizes listening skills.
3. Help students develop problem-solving skills.

J. Motivation

1. Challenges students to think critically and independently.
2. Encourages questions and discussion.
3. Provides opportunities for students to succeed.
4. Uses effective reinforcement techniques.
5. Encourages students through meaningful praise.
6. Avoids using intimidation, sarcasm or ridicule.

K. Student Involvement

1. Fosters an atmosphere where students participate freely.
2. Asks questions which require varied levels of thinking.
3. Allows appropriate time when seeking student responses.
4. Seeks clarification of student responses when needed.
5. Engages students in appropriate and meaningful tasks.
6. Provides leadership opportunities for students.

L. Student Evaluation

1. Maintains high standards and realistic academic expectations.
2. Holds students accountable for their own learning.
3. Uses fair and appropriate methods to measure student learning.
4. Provides regular feedback and communicates academic progress to students in a timely manner.
5. Communicates academic progress to parents.
6. Grades students according to district standards.

II. Classroom Management and Learning Environment

A. Classroom Rules and Procedures

1. Establishes an understandable set of routine classroom practices.
2. Accomplishes routine tasks effectively and efficiently.

B. Discipline

1. Provides clear guidelines for student behavior.
2. Enforces those guidelines in a fair and consistent manner, taking individual differences into account.
3. Encourages self-discipline.
4. Deals effectively with disruptive students.
5. Promotes appropriate student conduct throughout the school setting.

C. Knowledge of Students

1. Understands individual needs.
2. Refers students to guidance staff and support programs when appropriate.
3. Is sensitive to the personality of each student.

D. Student Relationships

1. Is positive, supportive, and promotes students' self-worth.
2. Encourages a class atmosphere that generates acceptance of all.

E. Creativity

1. Creates an atmosphere that promotes originality of thought.
2. Encourages creative expression from students.

F. Classroom Environment

1. Arranges a physical environment which reflects learning.
2. Organizes classroom space and materials for effective use by students.
3. Creates an atmosphere in which students develop initiative and assume a personal responsibility for learning.

III. Professional Qualities

A. Rapport with Students

1. Respects all students.
2. Is considerate of student needs.
3. Is understanding, kind, fair, and patient.

B. Rapport with Parents

1. Is willing to work with parents in reaching solutions to problems.
2. Initiates parent contacts when appropriate.

C. Rapport with Professional Associates

1. Works cooperatively with administrators, supervisors, teachers, and other school staff members.
2. Uses constructive criticism for self-improvement.

D. Communication Skills

1. Speaks effectively.
2. Writes effectively.

E. Flexibility

1. Adapts to changes within the school environment.
2. Is able to work with a variety of people.

F. Sound Judgment

1. Makes professional decisions which reflect insight and discretion.
2. Exhibits the ability to arbitrate disagreements in a positive manner.

G. Professional Improvement

1. Uses self evaluation to improve teaching skills.
2. Participates in activities such as workshops, conferences, classes, in-service meetings, professional organizations.

H. Cooperation

1. Works willingly with others toward a common purpose.
2. Recognizes problems within the school environment and helps resolve them.

I. District Policies and Procedures

1. Follows district policies and procedures.
2. Is punctual, maintains duty hours, and is regular in attendance.

J. Record-keeping

1. Is accurate and neat with records and reports.
2. Is punctual with records and reports.

K. Out-of-Class Responsibility

1. Willingly gives assistance to students who need or request individual help.
2. Participates in the activities of the school.

L. Ethical Behavior

1. Has respect for all people.
2. Is a positive role model for students.
3. Supports school and district regulations and policies.
4. Uses student records in a professional manner.
5. Works with an interest to better the school, is fair and constructive in criticism, and takes pride in the teaching profession.

IV. Personal Qualities

A. Dependability

1. Is responsible.
2. Is reliable.

B. Tact

1. Is diplomatic.
2. Is perceptive in dealing with others.

C. Demeanor

1. Exhibits self-confidence and self-control.
2. Has a sense of humor.

D. Enthusiasm

1. Is energetic.
2. Enjoys working with students.

E. Grooming

1. Is appropriately dressed.
2. Is well groomed.

MARKING SAMPLE

(category)	1. Instructional Performance	Perf. Level	(Mark S or U)
(performance standards) (skills or qualities)	A. Knowledge of Subject Matter 1. Has a thorough understanding of subject matter 2. Is able to communicate that know- ledge effectively	□	(Mark S, N or U)
(performance standards) (skills or qualities)	B. Planning 1. Follows established district cur- riculum 2. Writes long-range, unit, and daily plans	□	(Mark S, N or U)

WILLIAM J. BAIRD (1912-1981)
KENNETH S. HOLM
EDMUND S. McEACHEN
ELEMENT S. PEDERSEN
RYL F. HAMANN
ROLF L. STRASHEIM
VID C. ERICKSON
ERALD P. LAUGHLIN
JOHN S. ZEILINGER
GARY W. RADIL
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MICHAEL G. LESSMANN
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April 25, 1985

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JOHN P. NEIL
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THOMAS S. ASHBY
JAMES HAWEKOTTE
RICHARD R. ANDRESEN
OF COUNSEL

Mr. Edward U. Cate
Attorney at Law
400 West "U" Street
Omaha, Nebraska 68100

TENURED TEACHER HEARING LETTER

HAND DELIVERY

Re: Hearing

Dear Ed:

I am writing this letter in response to your client's letter to Dr. Joe E. Hanna, Secretary of the Board of Education of the School District of Omaha, dated March 29, 1985. In that letter requested a hearing on the administration's recommendation of March 28, 1985, that his teaching contract with the School District of Omaha be terminated effective at the close of this school year. In his letter also requested a complete listing of all the charges that serve as the grounds for termination of his teaching contract, a complete list of all the witnesses who will testify against him, a summary of the testimony of each witness, and copies of all documents which will be presented at the hearing and used either as a basis for any testimony or are identified as exhibits.

Pursuant to the statutes of the State of Nebraska, in particular Sections 79-12,114 and 79-12,115, is entitled to notice at least five calendar days prior to the hearing of the following:

1. The date, time and place of the hearing;
2. The grounds alleged for termination of his teaching contract;
3. Upon his request, a notification of the names of any witnesses who will be called to testify against him; and
4. Also upon his request, an opportunity to examine any documents that will be presented at the hearing.

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In addition to these notice rights, _____ also has the right to be represented by counsel, the right to cross-examine all witnesses, and the right to examine all documents and to present evidence material to the issues raised by the administration. It is also our understanding that in compliance with case law established by the Nebraska Supreme Court _____ also has the additional right to know the nature of the testimony of each of the witnesses who will appear against him.

In light of these legal requirements, the Superintendent responds to _____ letter of March 29, 1985, as follows:

I. Notice of the Date, Time and Place of the Hearing.

The hearing is scheduled to take place on May 2 and 3, 1985, commencing at 1:00 p.m. at the Board of Education Hearing Room in the Carriage House at the Joslyn Castle, 3902 Davenport Street, Omaha, Nebraska.

II. Grounds for Termination of His Teaching Contract.

_____ teaching contract is being terminated pursuant to the provisions of Section 79-12,112 of the Nebraska Statutes which authorizes termination for just cause as defined in Section 79-12,107 of those statutes. Among the grounds permitted by Section 79-12,107 as just cause for termination is incompetency. Section 79-12,107(4)(a) states as follows:

"Just cause shall mean: . . . Incompetency, which shall include but not be limited to, demonstrated deficiencies or shortcomings in knowledge of subject matter or teaching or administrative skills"

The administrative recommendation contained in Dr. Ronald F. Anderson's letter of March 28, 1985, is based upon _____ incompetency as a teacher.

Specifically, _____ lacks knowledge of and follow through on in depth planning. His learning activities do not match the objectives of his lessons and leave his students confused. Also, his objectives are often poorly selected. There is poor lead in and closure on his lessons. _____ lacks the ability to properly model a lesson. He has failed to regularly provide enrichment for students who have mastered sixth grade

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learning skills and lacks the knowledge of how to properly help students who have not mastered these learning skills.

is unaware of the skill mastery level of his students. His teaching fails to properly motivate his students. There is very poor interaction between teacher and students and among students in his classroom. The classroom atmosphere is generally negative. Students do not seem to respect and give the impression that they are simply serving a sentence. This negative classroom atmosphere is attributable both to lack of skill in teaching techniques and also due to his poor classroom management. Finally, exhibits a very poor attitude toward constructive criticism.

In sum, is not providing minimally satisfactory teaching to his students.

III. The Names of the Witnesses Who Will Be Called By the Superintendent.

As of the date of this letter, the following witnesses will be called by the Superintendent at the hearing. This list of witnesses does not include the names of those witnesses who may be called as rebuttal witnesses should any such witnesses be necessary:

- A. Norma Deeb, Principal of Boyd Elementary School;
- B. Aileen Nystrom, Intermediate Supervisor, Department of Instructional Services;
- C. Betty Haskins, Principal of Pawnee Elementary School;
- D. Denese Martin, Intermediate Supervisor, Department of Instructional Services;
- E. Dr. Hawthorne Faison, Executive Director, Department of Instructional Services;
- F. Mardelle Olson, Intermediate Supervisor, Department of Instructional Services; and
- G. Dr. Ronald F. Anderson, Assistant Superintendent, Department of Staff Personnel Services.

IV. The Nature of the Witnesses' Testimony.

A. Norma Deeb

Ms. Deeb will testify that she holds a Bachelor of Arts Degree in Elementary Education and a Master of Arts Degree in Educational Administration and Supervision from the University of Nebraska at Omaha. She will also testify that she has completed all of her course work for a Doctorate in Education at the University of Nebraska at Lincoln. She will testify that she has been the principal at Boyd Elementary School for the last three school years and prior to that was the principal at Kellom Elementary School for several years.

She will testify that she formally observed classroom performance on January 26, 1983, February 7, 1983, February 28, 1983, March 7, 1983, and May 4, 1983. She will discuss each of these observations and explain the general observations and comments contained on the observation logs for each of these observations.

She will detail her major concerns with teaching. Her major concerns centered on poor instructional planning and teaching techniques, his poor communication and control skills in the classroom, his lack of professionalism with staff members, his poor response to constructive criticism, his poor classroom atmosphere, and the lack of his student's respect for him. In discussing these major concerns, Ms. Deeb will discuss her March 8, 1983, appraisal of

Ms. Deeb will also testify concerning the efforts she engaged in to help improve his teaching techniques. In addition to the comments shown in the observation logs, Ms. Deeb will discuss her teaching of classes so he could observe her teaching methodology and efforts that were made to help observe other teachers in the School District who had a reputation for doing a good job of teaching.

Finally, Ms. Deeb will testify concerning failure to live up to the standards expected of other teachers in the School District of Omaha and will compare teaching skills to other teachers she has supervised in her tenure with the School District of Omaha. Ms. Deeb will testify that is one the poorest teachers she has ever supervised and that currently there are no teachers that she has supervised

who are still employed by the School District and who are as poor a teacher as

B. Aileen Nystrom

Ms. Nystrom will testify that she has a Bachelor of Science in Education from the University of Nebraska at Omaha and a Masters of Science in Elementary Education from the University of Nebraska at Omaha. She will testify that she taught school for various school districts, including the School District of Omaha for 18 years and has served as an intermediate supervisor in the School District of Omaha for the past 19 years.

Ms. Nystrom will testify concerning her experience with while she was an intermediate supervisor with responsibility for Boyd Elementary School during tenure at Boyd. In particular, she will focus on the 1982-83 school year and discuss her observations of on November 29, 1982, March 9, 1983, May 3, 1983, May 9, 1983, May 13, 1983, and May 18, 1983. In discussing her observations of , Ms. Nystrom will also discuss the general role of an intermediate supervisor in the School District of Omaha and discuss her standard operating procedures in conducting observations.

She will testify that her major concerns about were that he did not prepare his lessons thoughtfully, that he did not identify objectives or how to achieve them. She will testify that in her view all he did was assign pages and that there was no instruction occurring in his classroom. Ms. Nystrom will testify that seemed to lack judgment in determining the needs of his students. He did not challenge capable students and did not provide for remediation or reinforcement for less capable students. He appeared not to have or not to use the necessary skills or techniques to communicate instructionally with students. She will further testify that was not able to create a classroom atmosphere conducive to learning. There were no interesting or exciting learning activities evident in the classroom. His pupils were bored, inattentive, even disrespectful. Finally, she will testify that no improvement was evident by the end of the year.

She will detail the efforts which she made to help , including the comments which she made on her observation logs, the time spent conferencing with him, the help she provided in having him visit and observe other teachers teaching sixth grade.

Finally, she will testify that _____ did not live up to the standards required of other intermediate teachers in the School District of Omaha and that in fact he was one of the worst teachers she has ever supervised and that none who are worse than he is are still employed.

C. Betty Haskins

Ms. Haskins will testify that she has a Bachelor of Arts in History and English from Mount Marty College, a Masters Degree in Educational Foundations from the University of Nebraska at Omaha, and in addition, 36 hours beyond the Masters Degree, 24 of which are in Educational Administration. She will testify that during 19 years of teaching, she taught every grade from second through junior year in high school. She will testify that she was an administrative intern at Belvedere Elementary School during the 1975-76 school year and an assistant principal there during the 1976-77 school year. From the 1977-78 through the 1981-82 school year she was principal at Mount View Elementary School and since the 1982-83 school year has been principal at Pawnee Elementary School.

Ms. Haskins will testify concerning her experience with _____ in her capacity as principal of Pawnee Elementary School for the 1983-84 and 1984-85 school years. She will focus her discussion on her appraisals of February 27, 1984, and March 11, 1985, and also on her personal observations of _____ teaching on September 20, 1983, October 17, 1983, January 18, 1984, January 30, 1984, February 9, 1984, February 21, 1984, March 28, 1984, August 30, 1984, September 6, 1984, September 13, 1984, October 8, 1984, November 6, 1984, and February 27, 1985. She will also focus on her observation of and comments upon video taping of _____ classroom which occurred on September 14, 1984, October 12, 1984, November 2, 1984, and November 8, 1984.

She will testify that her major concerns with _____ were his lack of in depth planning particularly with respect to implementation of that planning. She will testify that _____ did not follow through on the planning he had done for his lessons and that he in general failed to motivate students to learn. She will also testify that _____ did not supply the necessary enrichment for students who needed it. She will elaborate on the serious concerns noted in _____ most recent appraisal concerning rapport with students, rapport with professional associates, decision-making skills, knowledge of

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subject matter, communicative skills, teaching techniques, classroom organization, lesson plans and goals, classroom atmosphere, knowledge of students, student involvement, respect, demeanor, tactfulness, attitude toward constructive criticism, enthusiasm, and judgment.

She will testify concerning her standard operating procedure in supervising those teachers under her responsibility as a principal. She will detail the efforts which she made to help become an at least satisfactory classroom teacher. In particular, she will discuss the efforts made to carry out the June 5, 1984, plan of action for improved teaching performance for She will testify that each of the efforts outlined in that memo to help were essentially carried out.

Finally, she will testify that teaching did not meet the standard required of other teachers teaching in the intermediate grades in the Omaha Public Schools and that teaching performance is one of the two or three poorest she has ever seen as an administrator in the Omaha Public Schools. She will conclude that no other teacher that she has been responsible for as an administrator is currently performing as unsatisfactorily as

D. Denese Martin

Ms. Martin will testify that she has a Bachelor of Science in Elementary Education and a Master of Science in Elementary Education both from the University of Nebraska at Omaha and that she has earned 21 hours of credit beyond the Masters Degree in educational administration and supervision. She will also testify that she was a classroom teacher for 8 years and has been an elementary supervisor or assistant principal for 14 years.

Ms. Martin will testify generally concerning her experience in working with in her capacity as an intermediate supervisor for the School District of Omaha with responsibility for Pawnee Elementary School during the 1983-84 and 1984-85 school years. She will testify concerning her standard operating procedure as a supervisor and concerning the role of a supervisor in the School District of Omaha. In particular Ms. Martin will focus on her observations of teaching on September 29, 1983, January 18, 1984, January 31, 1984, September 28, 1984, October 16, 1984, November 7, 1984 and February 20, 1985.

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She will testify that her major concerns based on her observation of _____ classroom were that there was very little formal instruction occurring, that there was no enrichment for students who had mastered skills, that _____ did not know who had and who had not mastered the skills being taught, that _____ did not know how to help those who had not mastered the skills he was teaching, that there was a lack of interaction between the teacher and students and between the students themselves and that _____ could not model a lesson.

Ms. Martin will testify that she and other School District of Omaha employees gave extensive help to _____ to help him improve his teaching skills. She will detail those efforts and also will discuss the efforts made to carry out the June 5, 1984, plan of action for improved teaching performance for _____. She will testify that despite all of these efforts, she basically saw no improvement in _____ teaching performance.

She will testify that _____ does not meet the standard of teaching competence that is required of other teachers teaching in the intermediate grades in the School District of Omaha. In fact, she will testify that in her 13 years as a supervisor only two or three other teachers she supervised were worse than _____ and that he is in fact the worst teacher she is now supervising. She will also testify that _____ has made no real effort to improve and has been very defensive throughout this whole effort to help him improve his teaching skills.

E. Hawthorne Faison

Dr. Faison will testify that he has a Doctorate of Education from the University of Toledo in Administration and Supervision and Curriculum. In addition Dr. Faison has engaged in advanced studies at Cornell University and at New York State University at Plattsburg. He has a Master of Arts Degree from the Teachers College at Columbia University in Elementary Administration and a Bachelor of Science Degree in Elementary Education from St. Paul's College in Lawrenceville, Virginia. Dr. Faison will testify that he was an intermediate grade teacher for 10 years, a science specialist for 3 years, a curriculum specialist for 1 year, a coordinator of the teacher corps for 6 years, the coordinator of the Metropolitan Toledo League of Multi-Unit Schools for 3 years, an elementary school principal for 6 years, a junior high school assistant principal for 1 year, and Executive Director of the Department of Instructional Services for the School District of Omaha for 2 years.

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Dr. Faison will testify generally concerning his experience with [redacted] during his two years as Executive Director in the Department of Instructional Services for the School District of Omaha.

He will testify that since coming to Omaha he has been in every classroom in the School District several times. He will also testify concerning how he became involved in observing classroom teaching. Dr. Faison will testify that he was called in as an independent observer by Betty Haskins and Denese Martin. In particular, he will discuss his observations of classroom teaching on April 2, 1984, September 19, 1984, October 12, 1984, October 24, 1984, November 9, 1984, and February 25, 1985.

Dr. Faison will testify that his major concerns about [redacted] were that [redacted] lessons were ineffective because his planning was ineffective, that there was no lead-in for students to understand why a lesson was important, and that there was often no closure to a lesson or, if there was one, it was very poor. Dr. Faison will also testify that [redacted] could not succeed without writing out much more detailed lesson plans than there was space for in the planning book and that [redacted] did not follow-up on Dr. Faison's offer to help him after Dr. Faison went through drafting one lesson plan for [redacted]. Dr. Faison will also testify that [redacted] was very poor at generating interest in students for their lessons. Dr. Faison's final major concern was that [redacted] exhibited no improvement in any of these areas during the time he worked with him.

Dr. Faison will testify concerning the efforts he and other School District of Omaha staff members made to help [redacted] improve his teaching performance. In particular Dr. Faison will discuss the role he played in carrying out the plan specified in the June 5, 1984, plan of action.

Finally, Dr. Faison will testify that [redacted] did not meet the standard of teaching performance required of other teachers teaching the intermediate grades in the School District of Omaha.

F. Mardelle Olson

Ms Olson will testify that she holds a Bachelor of Science Degree from Wayne State in Elementary Education and Political Science and a Master of Science Degree from the University of Nebraska at Omaha in Elementary Education. She will

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testify that she taught in the intermediate grades for 10-1/2 years, has been an intermediate supervisor in the School District of Omaha for 16-1/2 years, and was for 1 year the part-time principal at Yates Elementary School.

She will testify concerning her role as a supervisor in the School District of Omaha and concerning her standard operating procedure in supervising teachers assigned to her. She will testify concerning her involvement in observing teaching performance. In particular she will testify concerning her observations of teaching performance on October 17, 1984, December 11, 1984, and February 26, 1984.

Based upon those observations she will testify that her major concerns with were his inability to see that he had a serious problem with his teaching competency, that his learning activities did not match the objectives of his lessons and thus left the students confused concerning what they were supposed to be learning, that he poorly selected his objectives, and that his classroom atmosphere was very negative. Ms. Olson will testify that it was her impression of the students that they seemed simply to be serving a sentence. There was very little interaction between the teacher and students and among the students themselves.

She will testify that she was brought in by Dr. Ron Anderson to observe as a check to be sure no stone was left unturned in an effort to fairly observe and aid

She will testify concerning a conversation with as a result of her observations.

Finally, she will testify that does not meet the standards required of other intermediate grade teachers in the School District of Omaha. She will testify that is a very poor teacher, is not competent, and that she would not want her child in classroom.

G. Ronald F. Anderson

Dr. Ronald Anderson will testify that he has a Bachelor of Arts Degree from Doane College, a Masters of Science in Education Degree from the University of Nebraska at Lincoln and a Doctorate in Education Degree from the University of Nebraska at Lincoln. He will also testify that since beginning his career in education in 1950, he has been a secondary school teacher, an elementary school principal, a director of elementary education,

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an assistant superintendent and a superintendent of schools. Presently he is the Assistant Superintendent for the Department of Staff Personnel Services for the Omaha Public Schools, a position he has held since 1969.

Dr. Anderson will testify concerning his experience with in his capacity as Assistant Superintendent for Staff Personnel Services over the last several years. In particular, Dr. Anderson will focus in on his experience with during the past three school years.

Dr. Anderson will focus on his involvement with in the second semester of the 1982-83 school year. Dr. Anderson will detail several conferences which he held with during that second semester and will discuss his letter of April 1, 1983, to . Dr. Anderson will discuss transfer at the close of the 1982-83 school year and the reasons for it. He will testify that the transfer occurred in an effort to give a fresh start in a new setting.

Dr. Anderson will then detail his involvement with while was a teacher at Pawnee Elementary School. In particular, Dr. Anderson will detail the reasons for his recommendation on March 16, 1984, that teaching contract with the School District of Omaha be terminated. Dr. Anderson will discuss in detail his letter of May 1, 1984, concerning teaching performance. In so doing, Dr. Anderson will also discuss his conference with on March 9, 1984.

Dr. Anderson will detail the efforts he and other School District of Omaha staff made to assist in improving his teaching performance. In this regard, Dr. Anderson will discuss in detail the June 5, 1984, plan of action for improved teaching performance.

Dr. Anderson will also discuss his continued role in reviewing the employment status of during the 1984-85 school year. In particular, Dr. Anderson will discuss his reasons for recommending the termination of teaching contract. Those reasons are stated above in Paragraph II of this letter.

Dr. Anderson will discuss in detail his involvement in consulting with each of the principals and supervisors involved in appraising work.

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Dr. Anderson will testify that _____ does not meet the standards required of other intermediate grade teachers in the School District of Omaha, that _____ teaching performance is incompetent, and that _____ contract should be terminated for the sake of the education of the students in the School District of Omaha.

V. Exhibit List.

Attached hereto and made a part hereof is a list of exhibits which the administration intends to present in its case-in-chief. Other exhibits not on this list may be presented in rebuttal. Obviously, at this point in time, we cannot specify what those exhibits may be since we do not know who will testify on _____ behalf or what exhibits he may choose to introduce.

It is my understanding that you have already reviewed _____ complete personnel file and have copies of the video-tapes of his classroom teaching. Obviously, if you need to review this file again or view the tapes, we will make them available to you.

It is my understanding from our telephone conversation of last week that upon receipt of these materials from us and your review of them, you will notify me concerning who your witnesses will be and what exhibits you intend to introduce. I would be happy to work with you concerning any stipulations regarding foundation and also concerning any procedural matters which we can work out in advance so that the hearing flows smoothly. Please give me a call after you have had a chance to review this letter.

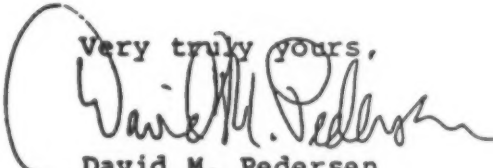
Also as we discussed over the phone, this hearing will be conducted with the President of the Board, Brenda Warren, acting as the presiding officer. The hearing will not be conducted according to the strict rules of law relating to the examination of witnesses or the presentation of evidence. Any relevant evidence will be admitted by the presiding officer if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law. Each party will have the right to submit a memorandum of points and authorities, and the Board of Education may request a memorandum to be filed following the close of the hearing. Both sides may call and examine witnesses and cross-examine witnesses called by the other side. We will present the Superintendent's position first, following which you will present the position of _____. Opening and closing statements are generally permitted by the presiding officer.

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It is also my understanding based on our telephone conversation of last week that you do not object to the Board of Education conducting this hearing without legal counsel to advise the Board of Education. It is my understanding that you and I have agreed that if the Board has a legal question it wants answered while it is deliberating in private session, that the Board of Education would come out of executive session and request input from each of us on that legal question. Neither of us would be present during the executive session deliberations of the Board.

Please give me a call if you have any questions concerning this letter and please advise me as soon as possible of the witnesses whom you intend to call and the exhibits you intend to introduce.

Very truly yours,



David M. Pedersen
FOR THE FIRM

DMP:mdc

Enclosures

cc: Dr. Norbert J. Schuerman
Superintendent

Dr. Ronald F. Anderson
Assistant Superintendent

Dr. Joe E. Hanna
Secretary, Board of Education

TEACHER EVALUATION

A.168

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Effective Documentation For Employee Improvement Or Termination

by Kelly Freis and Timothy Cooper

As a followup to the TASB Spring Workshops which focused on board-superintendent evaluation as a cornerstone of an effective personnel management system, this article gives a legal point of view on establishment of a system for documentation relative to evaluating employee performance.

The primary objective of a school district's employee evaluation system is to improve employees' performance so they can become successful and contribute to the objectives of the district. If the evaluation does not produce this positive result the employee must be replaced, either by resignation or termination. The district's evaluation system thus serves a secondary function—the removal of the unsatisfactory employee.

Depending upon the nature of the employee's contract with a school district, various degrees of procedural due process must be observed in relieving a person of the position if he or she does not resign. In many situations this process culminates with a hearing before the board of education

to determine whether there is cause to terminate the employee. Much has been written about the due process requirement involved in the termination process, but no attempt will be made here to review the procedural requirements necessary to effect a termination. Instead, this article will provide practical advice to administrators and board members concerning the documentation which should be generated and used in the evaluation process and presented at a hearing to support a recommendation for termination. It is important to remember that the due process rights of employees do not shield them from termination. Incapable or insubordinate employees can and should be terminated. Due process requirements simply prescribe procedures which must be followed in effectuating those terminations.

In employee termination hearings, administrators are often met with the claim that there is too little documentation or evidence of help being given to the employee, therefore, the administrator has not done his or her job in

working with the employee. In other cases the claim is made that the administration has developed so much documentation that the employee been harassed. At other employee termination hearings the complaints are made that the process is unfair and that the employee did not know what was expected in the performance of his or her duties. As a result of these attacks, there has been a noticeable unwillingness on the part of administrators to bring a recommendation for termination to the board of education. In most situations, the administrator recognizes that the administrator, rather than the employee, will be put on trial.

In an effort to provide support for the administration and to help ensure the fair treatment of employees who are evaluated, a simple but effective system of documentation has been developed which can be used in conjunction with virtually any school district's evaluation system. This documentation system can be used in districts which utilize the various contractual schemes authorized by state

About the Authors:

Kelly Freis and Timothy Cooper are associated with the law firm Bracewell & Patterson of Houston and are very active in school law in Texas.

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A more detailed analysis of documentation, together with additional forms, can be found in the NOLPE minimonograph "A Documentation System for Teacher Improvement or Termination," Revised 1985, by these authors.

National Organization on Legal Problems of Education (NOLPE), Southwest Plaza, Suite 223, 3601 S.W. 29th, Topeka, Kansas 66614. (913) 273-3550.

statute. The goal of this documentation system is to humanize the evaluation and documentation process with the ultimate objective of improving an employee's performance to an acceptable level. If performance does not improve, the system is designed to provide an incentive for voluntary resignation, or if voluntary resignation is not received, to provide the necessary documentation for the administration to have confidence in recommending the employee's termination to the board.

This documentation system becomes an essential ingredient in preparing the district's administration not only for a hearing before the board of education, but for appeals and lawsuits filed with the Commissioner of Education or a court. This system can also provide the necessary documentation to sustain the termination when the teacher files a discrimination complaint with the Equal Employment Opportunity Commission or the Education Department (formerly the Department of Health, Education and Welfare).

THE DOCUMENTATION SYSTEM

The documentation contemplated in an employee evaluation system involves the use of several types of written memoranda. First, memoranda to the file should be used to record less significant infractions or deviations by an employee. Second, specific incident memoranda should be used to record conferences with an employee concerning a significant event. Third, summary memoranda should be used to record conferences with an employee in which several incidents, problems, or deficiencies are discussed. Fourth, visitation memoranda should record observations made of an employee's on-the-job performance. Fifth, an assessment instrument should be used to evaluate the employee's overall performance.

The documentation concerning an employee can and should be used for several purposes. First, it enables the

administrator to follow an employee's actions and performance, thus enabling the administrator to pinpoint weaknesses and problem areas. Second, it enables the employee to understand what problems he or she may have and take what corrective steps are necessary. Third, if an employee's performance does not improve, it serves as concrete evidence to support a recommendation for termination.

The process outlined below should keep the volume of documents to a minimum and meet the need for full and complete documentation. This documentation system anticipates that a district has an evaluation system, and it attempts to take into account the practicalities of the time constraints placed on school administrators. By following the suggested documentation scheme below, these goals should be attainable.

Memoranda to the File

Whenever an administrator observes an incident or behavior which is not of significantly serious nature to require an immediate conference with the employee, but which should be considered in an employee's evaluation or at a general conference with the employee, it is appropriate for the administrator to prepare a short file memorandum. These file memoranda can be in various forms, such as a notation on a calendar or in a notebook with separate pages designated for specific individuals. These file memoranda should include the name of the employee, the name of the administrator, the date of the occurrence and the facts of the event observed. These file memoranda can be used for the following purposes:

- Conference with the employee concerning the incident.
- Assessment of the employee's performance.
- Refreshing the memory of the administrator for testimony at any proceeding or hearing relative to the employee's performance.

Copies of these file memoranda need not be given to the employee unless the employee requests them un-

der the Texas Open Records Act; however, if the copies are not given to the employee, they should not be used in a subsequent hearing in an attempt to establish facts. Actually the best practice is to incorporate the contents of these file memoranda into a summary memorandum or evaluation which is given to the employee after a conference. If a summary memorandum includes the information contained in file memoranda, file memoranda should never have to be used again.

Even though it may not be the intention of the administrator to use these documents as future evidence, or to share the file memoranda with the employee, the memoranda should be written with the knowledge that in some future proceeding copies may actually be introduced into the proceeding or made available to the employee through a request under the Texas Open Records Act. For example, if file memoranda are being used to refresh an administrator's memory at a hearing, the attorney for the employee is entitled to see copies of the documents. Thus, care should be taken with file memoranda, as with any other memoranda, not to write or record anything in a manner that could cause future embarrassment. A good practice to follow is to record facts rather than conclusions in file memoranda.

Specific Incidents Memoranda

If the administrator observes an incident or behavior, or has a complaint from a third party, it may be appropriate to send the employee a memorandum concerning the incident. This memorandum should be sent only after the administrator holds a conference with the employee at which the incident is discussed and the employee's viewpoint considered. It is wise to have the employee acknowledge receipt of the memorandum by signing the copy. If the employee does not agree with the facts stated in the memorandum or the action taken, the employee should be given the opportunity to respond in writing either on the memorandum itself or on a sepa-

rate document. This can be accomplished by inviting the employee to make a written statement concerning any differences of fact or opinion expressed by the administrator in the memorandum by a certain date or within a given number of days. For example, the final paragraph of a memorandum might conclude, "If you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than (date) so we can meet and work out any difference." By so doing, any disagreement can be noted, and the differences hopefully resolved immediately.

If the specific incident concerning the employee comes from a third party such as a parent or student, care must be taken to fully examine the facts and determine whether the third party's information is correct. It is improper and potentially disastrous to base a decision to terminate on information from a third party when the truthfulness of the allegation has not been established. Upon receiving a third party complaint, the administrator should make an investigation and conduct whatever hearings are necessary to determine whether the complaint is true. An acceptable practice to follow when one receives a complaint from a third party would be to get the complaint in writing. The third party should be advised at this point that if adverse action is taken against the employee based on this incident, the third party must be available to testify before the board or a court. If the third party will not agree to appear as a witness, other independent evidence must be available to establish the relevant facts at a hearing; otherwise action adverse to the employee should not be taken. The next step would be to get the employee's side of the story, and this can be accomplished in a conference with the employee. If there is a discrepancy in the third party's story and the employee's story, the administrator should interview any witnesses and attempt to determine what occurred. It may be necessary to have the employee confront the complain-

ant in an informal conference to determine what actually occurred. Although the results of a polygraph test cannot be used in a termination proceeding, in really serious situations an employee might be allowed to voluntarily take a polygraph test to aid in establishing his or her innocence. In many cases, however, it will not be possible for the administrator to have agreement concerning what happened, so the administrator has to act as a judge and determine whose story he or she believes. If agreement can eventually be reached or if the administrator has enough facts to make factual determination, a specific incident memorandum can be prepared. Such a memorandum should explain the findings made by the administrator and the reasons for those findings. Specific directives or suggestions to the employee might also be included in the memorandum if appropriate.

It is essential to establish on the face of the specific incident memorandum that the employee received a copy of the document. Invariably in employee termination hearings, a dispute will arise over whether the employee ever received a copy of some document. It is essential, therefore, to have the employee sign acknowledging receipt, but not necessarily agreement, with the memorandum. If an employee refuses to sign, the administrator should have an adult witness present who will sign the document indicating that the employee was offered a copy of the memorandum and refused to sign, but that a copy was delivered to the employee. It should be made clear, either on the face of the document or orally, that the delivery of the memorandum and the signature of the employee indicating that a copy has been received do not constitute agreement. As noted previously, the employee should also be given the opportunity to respond in writing to the memorandum.

Giving the employee an opportunity to disagree with the content of the memorandum by responding in writing puts the employee on notice, and if

no disagreement is noted in writing, presumption is created that the contents of the memorandum accurately reflect the facts. A judge viewing this situation will normally take the view that a reasonable person receiving such a memorandum who disagreed with the facts would prepare a written response to the items with which there was disagreement. If the employee does not respond within the time stated in the memorandum, it becomes difficult to argue at a termination hearing that the employee disagrees with the content of the memorandum.

Visitation Memoranda

In some school districts it is a common practice of administrators to summarize a visit to a teacher's classroom. If visitation memoranda are used, their content should be reviewed with the teacher, and the teacher should be given a copy. Suggestions for improvement should be made in a conference and noted in the memorandum. A visitation memorandum may be used in the eventual termination process, but the results of a visitation are normally reviewed in a summary memorandum or the assessment document.

Summary Memoranda

Summary memoranda are ideal ways to outline the results of conferences concerning several incidents, classroom visitations or a conference regarding general employee performance. Through such memoranda, the matters referred to in the file memoranda (which were not given to the employee) can be incorporated; matters not reflected in other memoranda can be reduced to writing; directives can be given to the employee; understanding and standards can be established; and evidence that a conference was held and the subjects discussed can be established. A copy of each summary memorandum should be given to the employee and the employee should acknowledge receipt as with the specific incident memoranda.

dum. The employee should be invited and be given an opportunity to offer differences in writing with the facts and conclusions stated in the memorandum. If an employee disagrees and files a response, a subsequent conference should be held with a follow-up memorandum to try to resolve any differences which may exist. The same comments applicable to the specific incident memoranda are also applicable to summary memoranda, with the major difference being that summary memoranda are designed to cover general conferences with the employee on several matters rather than only on a specific incident.

The Assessment or Evaluation Document

The assessment or evaluation of performance document should be completed as prescribed by the policies and procedures of the district. A summary narrative or memorandum should be considered for each negative assessment noted in the document. This can be done on the assessment document or on an attachment to the evaluation itself. If the assessment is such that the employee might be terminated if no improvement is shown, the employee should be advised that failure to improve could result in a recommendation for termination. Furthermore, it is wise to include instructions or specific directions for improvement. Such a practice not only is helpful to the employee, but also strengthens the argument that the employee has been treated fairly if the administration's actions are later questioned. Through the use of such evaluation documents, the employee will be put on notice that he or she has deficiencies which could result in a proposal to terminate should those deficiencies not be remedied according to the instructions given for improvement.

In order to avoid difficulties with ratings on the evaluation, an employee should not be rated highly or too positively when he or she is initially employed or assigned to a school; rather,

a straightforward and truthful evaluation should be made. It is much easier to raise evaluations in subsequent years than it is to lower high ones. Furthermore, a fair system of evaluation requires the setting of standards and expectations at the beginning of the school year and the administrator following through with the implementation of those standards through the evaluation process.

Documentation in General

In preparing any memorandum, reliance should be made on the facts, and conclusory statements not supported by the facts should be avoided. For example, in a classroom visitation memorandum, the recitation that the teacher's classroom was "disorderly," without any explanation, is not very effective or specific. Rather, the administrator should note that he or she saw three children in the classroom talking during class and saw one child playing in the back of the room. The administrator should note that these acts were unnoticed by the teacher or were not corrected by the teacher. Furthermore, inflammatory words should not be used. For example, rather than to characterize an action as "insubordination," the action should be factually described, and the employee's action should be referred to as failure to comply with official directives and school board policy.

It is the quality of the memorandum and not the quantity of words or the number of pages that counts. Directives given in a memorandum should be direct, to the point, and educational jargon should be avoided. For example, when directing a sometimes tardy teacher to arrive at school on time, state: "You are required to be at school by (time) and you will be expected to have signed in by that time," rather than, "You are required to be at school on time." Instead of directing that: "Your lesson plans are due once a week," one might state, "Your lesson plans are due in my box by 4 p.m. on each Friday, and I expect you to have them there beginning this Fri-

day." When written in a constructive atmosphere, precise directives these tend to clear the air and a real or imagined confusion about what is expected.

The specific incident memorandum, the summary memorandum, the visitation memorandum and the assessment document should be written in the first person and personalized as much as possible. The use of "we" or "they" should be avoided unless two or more persons are involved and then the others should be identified by name. The key to the success of this documentation system is to provide an opportunity for the employee and the administrator to sit down and mutually work out the problem and determine the future actions of the employee.

Care should be taken to treat all employees alike, especially when dealing with absences and tardies. It is destructive and embarrassing to have a teacher's attorney present a school's sign-in sheet at a hearing to show that other teachers have more tardies and more absences than the teacher who is being proposed for termination for excessive tardies and absences.

Another thought to keep in mind is that one should never write a memorandum to an employee when one is angry. It is much better to reflect for a day or so or to call in a third party to review a memorandum prior to sending it in circumstances where the administrator is angry or personally involved. By doing so, the administrator can avoid statements which might later be regretted. In order to be effective, however, any memorandum must be prepared and sent to the employee soon after the incident and the subsequent conference occurs. Under no circumstances should a memorandum be prepared after the decision to terminate has been made and backdated to reflect the incident upon which the proposed termination will be based.

As in all employee matters, the evaluator should be careful to ensure that the employee feels he or she has

been fairly treated. One should remember that, if the employee's performance does not improve and a recommendation for termination is made, the fairness of the process will be judged by the members of the board, and possibly eventually the Commissioner of Education or a judge. In evaluating whether an employee has been treated fairly, one should attempt to view it from the perspective of the hypothetical, reasonable person who after receiving all the facts determines whether the process was fair. Another helpful standard for judging fairness is for the administrator to treat the employee as the administrator would like to be treated if he or she were in the same circumstances.

By following the procedure outlined above, the only documents which would normally be used as documentary evidence at a termination hearing would be the summary memoranda and the evaluation or assessment instruments. Occasionally, specific incident and visitation memoranda would be included; however, these specific incident and visitation memoranda should normally be reviewed and included in a subsequent summary memorandum or evaluation instrument. If the employee does not receive a copy of a memorandum to the file, it should not be used as evidence at a hearing, but should be used only to refresh the administrator's memory while testifying concerning the specific facts of an event. Again, if summary memoranda properly reflect the incidents recorded in the file memoranda, the file memoranda should not ever have to be referred to again.

EVALUATING TERMINATION OPTIONS

If the employee's performance does not improve to an accepted level or if the employee does not comply with administrative directives and board policies in an appropriate manner, the administrator will have to determine whether to recommend that the employee be terminated. Before a final recommendation is made to the board

concerning an employee's contractual status, the administrator and his or her supervisor should hold a conference with the employee. The employee should be confronted with his or her inadequacies or problems and be given an opportunity to explain his or her position. This is a hedge against misunderstandings of the basic reasons for the proposed termination, and it offers the employee a chance to present his or her side before a final recommendation for termination is made to the board. This will give the administrator and the supervisor an opportunity to consider any additional facts or viewpoints an employee may present, examine the situation more closely, and determine whether termination is the proper alternative. If there is actually a personality conflict between the administrator and employee, rather than a professional performance problem, a transfer to another school or department might be appropriate.

If it is determined in the conference with the employee that there is not sufficient evidence to support a termination or the administrator's supervisor feels the employee can improve and become successful, a recap and summary memorandum of the conference can be prepared setting out specific standards and directives for the employee to follow. In many cases, it will be appropriate to give the employee specific directives and cite the employee to specific policies which, if violated, could result in a recommendation for immediate termination in the future.

If, after hearing the employee's side of the story, the administration decides to go forward with the recommendation for termination, the employee can be advised of this and the employee can be offered an opportunity to resign. Care must be taken not to force the employee to resign. Rather, the employee should be advised of the right to a hearing before the board (if applicable under the contract or board policies) should the employee choose not to resign. A resignation must be

voluntary, and it is for this reason that it is advisable to have the administrator's supervisor present at the meeting, so any discussions concerning resignation can be witnessed. Providing the employee an opportunity to resign provides a professionally accepted escape prior to the recommendation for termination going to the board.

If, after the conference with the employee, the administrator and the supervisor determine that a termination recommendation should be made, a notice should be prepared. When the recommendation is made, the administrator and the supervisor should also submit an appropriate notification letter of proposed termination for review by the school attorney. The administrator and the supervisor should also prepare at this time, again for approval by the school attorney, the notice of reasons supporting the proposed termination and a list of witnesses together with their testimony which will be presented if the employee requests a hearing before the board. The preparation of these letters in advance of presenting the proposed termination to the board will aid the administrators in evaluating all facts and in determining whether a termination recommendation really should be made.

Like all other personnel techniques, this simple system of documentation is not fail-safe. It must be implemented by humans, and it is subject to error. This system does provide an opportunity for an administrator to effectively communicate with employees and develop the proper documentation for improvement or termination. In working with this system, the members of the board of education, the Commissioner of Education, or judges will evaluate the termination recommendation on the basis of fairness and reasonableness. In the implementation of this system, an administrator should be guided by the standard of treating the employee as the administrator would like to be treated if he or she were in the employee's position.

APPENDIX "A"

SAMPLE MEMORANDUM TO THE FILE

TEACHER: Willie Makit
SCHOOL: Theodore Inskeep Technical School
GRADE: 8th
SUBJECTS: Health & Sex Education; American History

- 9/20/79 - Did not sign in upon arriving at school. Arrived at 8:10 - 20 minutes late. (P.P.)
- 9/26/79 - In hallway near cafeteria at lunchtime. Did not challenge student who was in hall without permit. (P.P.)
- 10/2/79 - Talking with Bettie Wont in his classroom 45 minutes after school out with door closed. (P.P.)
- 10/3/79 - Talking to Bettie Wont in classroom 30 minutes after school out. No other students around and door open. (P.P.)
- 10/9/79 - Arrived 10 minutes late to school. Did not sign in until being reminded to do so by secretary Ida Spy. (P.P.)
- 10/10/79 - Failed to turn in weekly lesson plans by 4 p.m. (P.P.)
- 10/17/79 - Failed to turn in weekley lesson plans by 4 p.m. (P.P.)
- 10/21/79 - Arrived 20 minutes late to school. (P.P.)
- 10/27/79 - Did not sign in upon arrival. Secretary Ida Spy said arrived about 5 minutes late. (P.P.)
- 11/1/79 - Failed to turn in weekley lesson plans by 4 p.m. (P.P.)

APPENDIX "B"

SAMPLE SPECIFIC INCIDENT MEMORANDUM

TO: Willie Makit
FROM: Paul Principal
DATE: October 23, 1979
RE: Allegation of misconduct by Mrs. Harvey Wont,
Mother of Bettie Wont, Student

You will recall that Mrs. Wont called me on October 20, 1979, to complain that you had molested her daughter, Bettie, while you were visiting their home one afternoon after school. No one else was at their home besides you and Bettie. Specifically, Mrs. Wont alleged that Bettie stated that you had embraced her and then began fondling her private parts while suggesting that the two of you become "better acquainted" upstairs.

I called you in on October 21, 1979, to discuss the matter with you. You told me that you had not molested Bettie in any way and had made no suggestions to her concerning getting "acquainted". You told me that you had taken Bettie to her home that afternoon, but only because Bettie requested that you do so. You also told me that the reason for taking Bettie home was because she was very upset about not making the cheerleading squad and seemed to want someone to talk with. I asked you about the times I had seen you in your classroom with Bettie after school was dismissed. You responded that you had, in fact, on several occasions counseled her about various matters and that she had come to regard you as a friend and confidant. In regard to the specific alleged incident, you stated that you and Bettie had been talking and that you were ready to leave, when she came over and embraced you. She then told you she loved you and wanted you to stay with her. You said you told her that you could not do so and left.

On October 22, 1979, I had a conference with Mrs. Wont, you and Bettie. After a long discussion and after careful questioning, Bettie admitted that you had, in fact, not molested

her or made suggestions to her. She said she was angry at you for not staying with her, so she told her mother those things. Mrs. Wont apologized for the incident, as did Bettie.

Based upon this investigation, I have determined that you did not in any way molest Bettie Wont. However, I do find that your conduct in this matter is not totally in keeping with proper professional standards. You are surely aware that girls of Bettie's age are very impressionable. You should be very careful in your relations with female students not to encourage any infatuations they may hold. Furthermore, unless absolutely essential, you should avoid driving a female student home without someone else being present. More importantly, to avoid situations like this from arising, you should avoid visiting a female student in her home when her parents are not there. I will expect you to abide by these directives. I am also transferring Bettie from your Health and Sex Education Class into Felix Feelgood's class. Because of this incident, I think both of you will be more comfortable with this move.

If you disagree with the facts or conclusions stated as directives in this memorandum, please advise me in writing no later than _____ (Date), so we can meet and work out any differences.

/s/ _____
Paul Principal

I have received a copy of this memorandum.

/s/ _____ (Date) _____

APPENDIX "C"

SAMPLE SUMMARY MEMORANDUM

TO: Willie Makit
FROM: Paul Principal
RE: Conference - November 5, 1979

You will recall that on November 25, 1979, you and I had a conference concerning several aspects of your performance as a teacher. We discussed these topics:

1. Preparation and submission of lesson plans;
2. Arrival time for work; and
3. Teacher-student relations.

First, we discussed the fact that you have failed to turn in your weekly lesson plans by 4:00 p.m. on three occasions: October 10, 1979, October 17, 1979, and November 1, 1979. As we discussed, this is a very important part of your job as an educator. You told me you will make sure that your plans are on time from now on. I expect your lesson plans to be in my box by 4:00 p.m. every Friday beginning this Friday.

Second, we discussed several tardies and failures to sign in upon arrival at school. Specifically, you have arrived late on September 20, 1979, October 9, 1979, October 21, 1979, and October 27, 1979. You failed to sign in on September 20, 1979 and October 27, 1979, and had to be reminded to sign in on October 9, 1979. We discussed the importance of prompt arrival, and I directed you to arrive on time in the future. You will be expected to be at school at 7:50 a.m. each school day and to sign in.

Third, we discussed your failure to challenge a student who was in the hallway without a permit on September 26, 1979. You informed me that because you were new to the building you did not realize that students needed hall permits during

lunch hour. As I showed you, that rule is included in the Teachers' Handbook. In the future, you will be expected to be fully apprised of all the rules in that book.

Fourth, we once again discussed the incident involving Betty Wont. Our discussion was a short version of our October 23, 1979 conference, and I repeated the directives I gave to you at that time concerning conduct with pupils of the opposite sex.

Mr. Makit, I appreciate your cooperative attitude concerning the correction of these matters. If you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than _____ (Date) so we can meet and work out any differences.

/s/ _____
Paul Principal

I have received a copy of this memorandum.

/s/ _____ (Date) _____

Appendix "D"

SAMPLE SUMMARY MEMORANDUM
(SPECIFIC DIRECTIVES)

To: [REDACTED]
From: [REDACTED]
Date: May 5, 1981
Re: Conference of May 1, 1981

Over the past two years you and I have discussed your performance as a teacher at [REDACTED] School. We have had numerous conferences to discuss specific incidents which have arisen as well as our scheduled assessment conferences. As we neared the end of this school year it became apparent to me that you were continuing to experience difficulties in complying with directives and in meeting the school district's standards in certain instructional and non-instructional areas. With this in mind we had a conference in my office on May 1, 1981, to discuss your performance. At that conference we discussed the following areas, and I gave you specific directives for improvement.

1. Preparation and submission of lesson plans. Since your arrival two years ago, you have experienced difficulty in submitting lesson plans in a timely fashion. You have acknowledged this on prior occasions such as in our conferences of November 5, 1979, March 16, 1980 and September 30, 1980. In this conference you again acknowledged this was a problem, but you stated that your night classes at graduate school kept you from consistently completing the lesson plans on time. You stated that you felt this was a legitimate excuse. I explained to you that, while taking further coursework was a good thing, its demands do not excuse failure to meet the requirements of your job. I advised you that I must have the clearly written and completed lesson plans in my box by 4:00 p.m. every Friday.

2. Teacher-student relations. This is another area of historical difficulty. We discussed your initial failure to challenge a student for a hall pass on November 5, 1979, your failure to discipline students for setting fire to a trash can in your room on January 15, 1980, and your disruptive classes which caused Mr. Teacher and Ms. Teacher to complain on numerous occasions in the spring of 1980. We discussed these incidents in detail at your evaluation conference on March 10,

1980. You have acknowledged that these incidents occurred and have promised to make corrections, but you continue not to ask students in the hall for passes (January 6 and 25, 1980 and April 1, 16 and 25, 1981) and your classes have continued to be distractive to other teachers and students. As we discussed, these types of incidents and your failure to deal with them cannot continue. You must make the necessary corrections immediately.

3. Classroom work and the issuance of grades. As we discussed this is the most serious problem you have as a teacher. On four 9 week periods you were from 1 to 2 days late in getting your grades into my office (October 15, 1979, April 1, 1980, October 17, 1980 and March 30, 1981). After each of these incidents I conferred with you, and, once again, you blamed your night classes for the delay. I once again explained that that reason was not sufficient. In the latter of these conferences, April 2, 1981, you acknowledged that you had no daily or test grades for Health Education Period 1 and only 2 grades for Health Education Period 3. As has been explained at the first faculty meeting of each year and as contained on page 6 of the Faculty Handbook you must have at least 6 daily grades and 2 test grades for each 9 weeks reporting period. I specifically directed you to comply with these requirements.

the situation is serious.. As I told you, I recommended your employment for the 1981-82 school year only because of your assurances that you will correct these deficiencies and follow these directives and school board policy. You have been given a growth plan in connection with your assessment, and numerous aids have been made available to you. As you and I discussed, I want this to work out so you become a successful teacher and that you continue to teach here. However, if you fail to follow any of the directives we discussed at our conference and which I have outlined in this memorandum, I will have no choice but to recommend that your employment with the district be terminated immediately.

If you have any questions concerning these directives or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than _____ (Date), so we can meet and work out any differences.

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I have received a copy of this memorandum.

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(Date)



DES MOINES TEACHER PERFORMANCE EVALUATION INSTRUMENT

DES MOINES TEACHER PERFORMANCE EVALUATION INSTRUMENT

I. INTERPERSONAL RELATIONS

- A. Expresses concern for all students regardless of cultural, academic or intellectual needs.
 - 1. Demonstrates understanding and acceptance of differences among individuals and groups, (i.e., racial, ethnic, cultural, socio-economic, religious and handicapped).
 - 2. Displays nonsexist/multicultural attitudes.
 - 3. Provides constructive criticism to students and accepts it from them.
- B. Demonstrates sensitivity in communicating and working with staff.
 - 1. Works courteously and cooperatively with all school personnel.
 - 2. Uses discretion and respect in speaking of colleagues.
 - 3. Recognizes the need for and participates in teamwork for the improvement of instruction.
 - 4. Demonstrates willingness to share methods, materials and ideas with co-workers.
 - 5. Provides constructive criticism to administrators and accepts it from them.
 - 6. Keeps the administration informed of pertinent situations.
- C. Communicates with and informs parents concerning school-related matters.
 - 1. Provides a climate which promotes effective communication with parents.
 - 2. Cooperates with parents in the best interest of students.

II. PROFESSIONAL QUALITIES

- A. Demonstrates professionalism and professional growth.
 - 1. Establishes goals and initiates activities aimed at professional growth and development.
 - 2. Attends professional meetings (i.e., faculty meetings, conferences, staffings, screenings, teacher/student, in-service) promptly and courteously.
 - 3. Strives to improve classroom performance.
- B. Exhibits desirable non-classroom behavior.
 - 1. Accepts responsibility for and complies with rules and regulations of the school system.
 - 2. Exercises responsibility for student management throughout the entire building.
 - 3. Follows established communication channels.
 - 4. Submits required reports promptly and accurately.
- C. Demonstrates physical health and emotional stability necessary to perform assigned duties.
 - 1. Is punctual.
 - 2. Has regular attendance.
 - 3. Maintains self-control.
 - 4. Exhibits self-confidence.
 - 5. Maintains good health.

.I. LEARNING ENVIRONMENT

- A. Demonstrates the ability to plan and prepare appropriately.
 1. Develops plans consistent with short- and long-range goals and objectives of course(s).
 2. Prepares sufficient and appropriate written instructional plans for self/substitute.
 3. Uses appropriate activities and resources to meet the needs of varied interests and abilities.
 4. Has needed materials and equipment ready for use.
 5. Arranges classroom appropriately for class activities.
 6. Makes provision for student participation in plans.
 7. (Team Member) Plans cooperatively; carries fair share of team preparation.
- B. Exhibits a competent level of knowledge of subject matter and skillful organization of resources to meet the needs of varied student interests and abilities.
 1. Exhibits mastery of subject matter appropriate for grade/skill levels taught.
 2. Knows and uses content appropriate to the subject area and to the students' interests and abilities.
 3. Knows and uses suitable resource materials, procedures and models related to the instructional objectives.
 4. Knows and uses correct language appropriate to the subject area and to the student's interests and abilities.
 5. Knows and uses community agencies, groups, and individuals to enrich the educational program.
- C. Demonstrates the ability to utilize a variety of teaching techniques.
 1. States goals clearly and expects reasonable performance of students.
 2. Develops lessons, homework and assignments which are clear, meaningful and consistent with approved course goals and objectives.
 3. Provides explanations and directions that are clear, concise and easily understood.
 4. Exhibits a sense of timing and pacing that is suitable for the activity and the class.
 5. Adapts questions, statements and learning experiences to students' needs, capabilities and backgrounds.
 6. Enables all students to experience some success.
 7. Employs various teaching and learning strategies to meet the variety of classroom situations.
 8. Uses strategies which involve students in, in depth treatment of topics and higher levels of thinking.
 9. Develops concepts as well as skills (not simply teaching content through rote learning).
 10. Allows time in work schedule for students to share worthwhile ideas and experiences.
- D. Maintains a positive learning climate.
 1. Provides an atmosphere in which students remain at task.
 2. Exhibits friendly but positive control of class.
 3. Is well organized but flexible.
 4. Moves among students during work period when appropriate.
 5. Confers with students individually or in small groups.
 6. Uses positive humor when appropriate.
 7. Communicates class rules and regulations.
 8. Uses voice effectively.
 9. Shows enthusiasm when teaching.
- E. Prepares appropriate evaluation activities.
 1. Uses evaluation activities which reflect course objectives and varied abilities in the class.
 2. Provides regular feedback to students on their progress toward goals.
 3. Maintains a continuous record of student progress.
 4. Uses a clear, reasonable and fair grading system.
 5. Makes provision for student participation in evaluation when appropriate.

DES MOINES TEACHER PERFORMANCE EVALUATION INSTRUMENT

Name _____ Date _____ Time _____

School _____ Grades _____ Subjects _____ Team Member _____ Non-Team Member _____

Circle type of activity observed: teacher lecture, general class discussion, question and answer format, small group, library work, demonstration, test, laboratory, film, T.V., pupil reports, rehearsals, (other) _____

PERFORMANCE AREA I: Interpersonal Relations**LEVELS OF PERFORMANCE**

CRITERIA	N/O	DOES NOT MEET	NEEDS IMPROVEMENT	MEETS
THE TEACHER:				
A Expresses concern for students regardless of cultural, academic intellectual needs.	_____	Expresses and/or demonstrates obvious signs of stereotyping when relating to students.	Inconsistently recognizes and relates to individual differences of students.	Expresses concern for all students as evidenced by materials used in and interactions with the class.
B Demonstrates sensitivity in communicating and working with staff	_____	Does not demonstrate sensitivity in communicating and working with staff.	Associates with the staff but does not contribute, participate or share.	Cooperates by participating, contributing and sharing.
C Communicates with and informs parents concerning school related matters	_____	Avoids interactions with parents.	Intermittently communicates and cooperates with parents.	Communicates and cooperates with parents.

COMMENTS _____

OBJECTIVES FOR IMPROVING INTERPERSONAL RELATIONS	PROCEDURES FOR ACHIEVING OBJECTIVES	APPRAISAL METHOD AND TARGET DATE FOR ACHIEVEMENT	DATE ACHIEVED

PERFORMANCE AREA II: Professional Qualities**LEVELS OF PERFORMANCE**

CRITERIA	N/O	DOES NOT MEET	NEEDS IMPROVEMENT	MEETS
THE TEACHER:				
A Demonstrates professionalism and professional growth	_____	Shows little or no interest in professional growth activities.	Is inconsistent in participating in professional growth activities.	Seeks out and participates in relevant professional growth activities; links professional goals to those of the school organization.
B Exhibits desirable non-classroom behavior	_____	Refuses to comply with school regulations and policies.	Intermittently cooperates in supporting school regulations and policies.	Consistently supports school regulations and policies.
C Demonstrates physical health and emotional stability necessary to perform assigned duties.	_____	Is physically and/or emotionally unable to perform assigned duties.	Is often physically and/or emotionally unable to perform assigned duties.	Is physically and emotionally able to perform assigned duties.

COMMENTS _____

OBJECTIVES FOR IMPROVING PROFESSIONAL QUALITIES	PROCEDURES FOR ACHIEVING OBJECTIVES	APPRAISAL METHOD AND TARGET DATE FOR ACHIEVEMENT	DATE ACHIEVED

PERFORMANCE AREA III: Learning Environment

LEVELS OF PERFORMANCE

CRITERIA	N/O	DOES NOT MEET	NEEDS IMPROVEMENT	MEETS
THE TEACHER:				
A Demonstrates the ability to plan and prepare appropriately	—	Is disorganized in lesson preparation and organization.	Does not consistently plan and prepare materials in an organized manner.	Shows appropriate lesson preparation and organization of work. i.e., materials are available. There is evidence of long range planning.
B Exhibits a competent level of knowledge of subject matter and skillfully utilizes resources to meet the needs of varied student interests and abilities.	—	Lacks knowledge of subject matter; fails to use appropriate resources and materials to meet the needs of varied student interests and abilities.	Does not consistently demonstrate an understanding of the subject matter taught as evidenced by inappropriate use of resources and materials to meet the needs of varied students interests and abilities.	Demonstrates an understanding of the subject matter taught and utilizes resources to meet the needs of varied student interests and abilities.
C Demonstrates the ability to utilize a variety of teaching techniques.	—	The teacher fails to use varied techniques which are appropriate to the lesson.	Seldom uses varied techniques which are appropriate to the objectives of the lesson.	Uses varied techniques which are appropriate to the objectives of the lesson.
D Maintains a positive learning climate.	—	Exhibits little or no evidence of effective classroom management and control	Is inconsistent and/or uses inappropriate management strategies.	Uses appropriate classroom management to maintain a positive learning climate.
E Prepares appropriate evaluation activities	—	Fails to use appropriate evaluation activities relating to the instructional objectives	Is inconsistent in use of appropriate evaluation activities relating to the instructional objectives	Provides students with specific written and oral feedback using evaluation activities relating to the instructional objectives

COMMENTS

OBJECTIVES FOR IMPROVING LEARNING ENVIRONMENT	PROCEDURES FOR ACHIEVING OBJECTIVES	APPRAISAL METHOD AND TARGET DATE FOR ACHIEVEMENT	DATE ACHIEVED

EXPLANATION OF RATINGS:

MEETS—Regularly performs the tasks and exhibits the characteristics as described in this instrument.

NEEDS IMPROVEMENT— Is inconsistent in performing tasks and in exhibiting characteristics as described in this instrument and must improve to meet district standards.

DOES NOT MEET— Consistently fails to perform tasks and exhibit characteristics as described in this instrument and/or has failed to improve sufficiently to meet district standards.

Evaluator's Signature _____

COMPOSITE PERFORMANCE RATING

Teacher's Signature _____

Does Not Meet	Needs Improvement	Meets

Date _____

Article on Evaluation Procedure from current contract of Des Moines Independent Community School District

Article IX: Evaluation Procedure

A. Notification

Within four weeks after the employee reports to his/her assignment, the building principal or appropriate supervisor shall acquaint each employee under his/her supervision with the formal evaluation procedures as may be used and advise each employee as to the designated person or persons who will observe and evaluate the employee's performance. No formal evaluation shall take place until such orientation has been completed.

B. Formal Observation

Each employee shall be formally observed by his/her Employer for the purpose of evaluation at least two times during his/her first semester of employment, at least one time during the employee's second semester of employment, and at least once every year for the remaining period of probation. Each employee no longer on probation shall be observed by his/her principal or appropriate supervisor at least once every three years for the purpose of formal evaluation.

C. Conferences

Observation of an employee shall be followed by a personal conference between the employee and the Employer.

D. Written Evaluation

Evaluation shall then be reduced to writing and a copy given to the employee within fifteen (15) working days of the observation. If the employee disagrees with the written evaluation, the employee may submit a signed and dated written position to the building principal or appropriate supervisor and then the written position shall be attached to the file copy of the evaluation in question. The employee shall be asked to sign the written evaluation; however, such signature shall be understood to indicate the employee's awareness of the evaluation but in no instance shall the signature be interpreted to mean agreement with the content of the material.

E. Informal Observation

Additional evaluation of employees may occur through informal observations by the Employer. It may not be deemed necessary to reduce such evaluations to writing, and a verbal discussion between the Employer and the employee concerning the informal observation may suffice. If a written evaluation is deemed necessary, procedures C and D as outlined above shall be followed.

F. Personnel File

Each employee shall have upon request the right to review the evaluation documents contained in his/her personnel file. An employee has the right to respond in writing to any evaluation comments. Any complaints directed toward an employee which are placed in his/her personnel file shall be promptly called to the employee's attention in writing.

Article X: Transfer Procedures

A. Definition

Transfer is defined as movement of an employee to a different building.

B. Employee-Initiated Transfer

1. Notification of Vacancies (Openings)

The Employer will announce in the weekly Bulletin, not later than the last Tuesday in January, the known

existing full-time openings for certificated employees subject area or grade level and locations that will be available the following school year, except those vacancies resulting from retirements when the teacher retiring requests confidentiality.

The Employer, on the third Tuesday in March, will make a current listing for the following school year of openings existing as of that date.

Following April 1 and prior to August 28, known existing full-time openings for certificated employees identified by subject area or grade level and locations that will be available for the following school year will be maintained in the office of the Executive Director of Personnel, and a list of such openings shall be provided to the employee upon his/her written request. Known existing full-time openings for certificated employees identified by subject area or grade level and locations that will be available for the following school year will be posted in the office of the principal of each secondary school on the first Monday in August.

2. Request for Transfers

Immediately after an opening is made known, an employee desiring consideration shall submit a letter to the office of the Executive Director of Personnel, with a copy to the employee's principal, requesting consideration for the transfer. All letters requesting either general transfers or transfers to previously published specific openings must be received in the office of the Executive Director of Personnel by no later than April 1.

An employee desiring transfer to an opening known after April 1 and prior to August 28 shall submit a letter to the Executive Director of Personnel, with a copy to the employee's principal, requesting consideration for the transfer.

Employees who have filed a written request for transfer shall receive, through school mail, written acknowledgement of the request from the office of the Executive Director of Personnel, within ten working days of the request reaching the office of the Executive Director of Personnel. Should the request for transfer be filed during the summer recess and be accompanied by a stamped self-addressed envelope, the employee shall receive written acknowledgement through the U.S. mail within a reasonable number of days of the request reaching the office of the Executive Director of Personnel.

3. Procedure for Transfer

If more than one employee applies for the same opening under the above conditions, and in the sole, exclusive and final judgment of the Employer the employees' qualifications are considered equal, the employee with the greatest District seniority shall have priority.

C. Employer-Initiated Transfer

1. Notification

In the case of Employer-initiated transfers, the principal of the school in which the employee works shall inform the employee in writing of the reasons for transfer.

Employer-initiated transfers of an employee after the beginning of an academic year will not be effective until a personal conference has been held between the Employer and the employee.

D. Return Rights

Any employee assigned to an administrative supervisory position who subsequently becomes member of the bargaining unit shall be entitled to retain such rights as may have accrued under this Agreement.

Personnel Office
DES MOINES PUBLIC SCHOOLS

ADMINISTRATIVE GUIDELINES FOR THE IMPLEMENTATION OF TEACHER EVALUATION—

GENERAL INFORMATION

1. The building principal or appropriate supervisor is responsible for the evaluation of a teacher's work. Any administrator may be consulted to assist in arriving at a decision. The use of multiple evaluations is encouraged (principals, vice principals, directors, supervisors, and, especially at the elementary level, teams of principals working together on evaluation).
2. The evaluation of teachers on the Teacher Performance Evaluation Form is due at the time of the principal's scheduled conference with the Executive Director of Personnel and the Executive Director of Elementary/Secondary Education. The purpose of this conference is to discuss each teacher's performance. This conference shall be held not later than February 1.
In some instances, it may be necessary to re-evaluate the teacher after February 1, in which case notification will be given to the teacher concerned. It is the responsibility of the principal or appropriate supervisor to notify the teacher receiving a composite performance rating of less than "meets."
3. The offices of the Executive Directors of Personnel and Elementary/Secondary Education will schedule the annual principal's conference.
4. In case a teacher is transferred, the office of the Executive Director of Personnel shall notify the receiving building principal of the rating the teacher received during the most recent evaluation.
5. Principals and appropriate supervisors should feel free to place on record in a teacher's personnel folder any formal or informal observation which has been discussed with the teacher, then reduced to writing, with a copy given to the employee within fifteen (15) working days of the observation. The employee shall be asked to sign the written evaluation but it is understood that the signature acknowledges only awareness of the evaluation.
Teachers who are providing marginal service should be formally observed and evaluated annually.

PROBATIONARY TEACHERS

1. Under the provisions of the Code of Iowa and in the Des Moines Public Schools, the first two years of regular full time teaching are designated as probationary years.
2. Each probationary teacher shall be formally observed for the purpose of evaluation at least two times during his/her first semester of employment; at least once during the teacher's second semester of employment; and at least once for the second year of probation.

(Probationary Teachers, continued)

Evaluations shall be based on one or more observations. Information collected during observations will be discussed with the teacher, reduced to writing, and a copy given to the employee within fifteen (15) working days of the observation, and may contribute to conclusions contained in a subsequent composite performance rating. The employee shall be asked to sign the written evaluation. However, such signature shall be understood to indicate the employee's awareness of the evaluation and in no instance shall said signature be interpreted to mean agreement with the content of the material.

Following a personal conference between the evaluator and the teacher, the Teacher Performance Evaluation Instrument (including suggested areas for improvement) will be given to the teacher. A pre-evaluation conference, although not required, is strongly recommended as a means of enhancing evaluation procedures.

3. A first-year teacher is eligible for any composite evaluation. In the second year, the teacher must be evaluated as "meets" or must be given a performance rating of "does not meet," which will result in termination.

If a third year of probation seems desirable, administration, with the consent of the teacher, may extend the probationary period for an additional year. This procedure should be the exception rather than the rule. The final decision regarding extension of the probationary period is made by the office of the Executive Director of Personnel, who shall notify the teacher and building principal of the third year of probation.

NONPROBATIONARY TEACHERS

1. All nonprobationary teachers shall be observed and their effectiveness evaluated at least once every three years.

Evaluations shall be based on one or more observations. Information collected during observations will be discussed with the teacher, reduced to writing, signed by the teacher, and may contribute to conclusions contained in a subsequent composite performance rating.

2. Each nonprobationary teacher whom the principal or appropriate supervisor considers likely to be evaluated as less than "meets" shall be formally observed at least three times prior to the final conference with the Executive Directors of Personnel and Secondary/Elementary Education (on or about February 1). Following a personal conference, a Teacher Performance Evaluation Instrument (including objectives for improvement) will be given to the teacher.
3. All nonprobationary teachers whose building assignments have been changed shall be observed and their effectiveness evaluated at least once during the first year of reassignment.

COMPOSITE PERFORMANCE RATING OF LESS THAN "MEETS"

1. The principal or appropriate supervisor shall notify a teacher with a "does not meet" rating of his/her evaluation by February 1. The principal and appropriate supervisor shall present documentation to substantiate the evaluation, and shall notify the teacher in writing, verifying the evaluation, citing efforts made to help the teacher improve performance, and reasons for the recommendation for termination. A copy of this letter shall be placed with all copies of the Teacher Performance Evaluation Instrument in the teacher's personnel file.
2. Any conference held to inform a teacher that he/she is to be evaluated at less than "meets" must be summarized in a followup letter to be sent to the teacher, stating weaknesses and objectives for improvement.
3. If any teacher evaluated as "needs improvement" does not receive, during the subsequent year, a composite performance rating of "meets," he/she shall be reviewed by the Executive Director of Personnel and the Superintendent to consider recommendation of termination of employment.
4. If a teacher is evaluated as "needs improvement," the salary step increment shall be withheld for the subsequent year if, after review, the Executive Director of Personnel determines such action should be taken.
5. Final notification of the termination of the teacher's employment is the responsibility of the office of the Executive Director of Personnel.

COMPOSITE PERFORMANCE RATING THAT COMMENDS OUTSTANDING PERFORMANCE

1. The evaluator may use the Comments section of the instrument to describe outstanding performance.
2. The evaluator may write letters of commendation, with copies placed in the teacher's personnel file and sent to the appropriate director and/or supervisor.
3. The evaluator may write informal notes thanking the individual for his/her contribution and effort.

DEFINITION OF TERMS

1. "Standard." A professional judgment, based on observations, that an employee's performance either "meets," "needs improvement," or "does not meet" District standards, based on the criteria as described in the Teacher Performance Evaluation Instrument.
2. "Informal Evaluation." Any observation which is not reduced to writing and does not become a part of the teacher's personnel file.
3. "Formal Evaluation." Any observation discussed with the teacher, subsequently reduced to writing, and signed by the teacher, and placed in the teacher's personnel file.
4. "Composite Evaluation." Final aggregate rating of the three performance areas.

QUESTIONS

1. Is there a certain number of checks needed to determine a composite rating of "needs improvement" or "does not meet"?

No, this is an administrative judgment based on individual circumstances.

2. What is required to terminate a teacher, based on competency?

A teacher must be evaluated and informed of weaknesses, the evaluation(s) must then be reduced to writing with recommendations of ways to improve performance, and a copy must be given to the teacher. Sufficient time should be accorded the teacher to improve performance.

3. What is the purpose of teacher evaluation?

Teachers are evaluated to promote professional growth, to improve job performance, and, where necessary, to terminate a teacher's contract.

4. Can a teacher be formally evaluated after February 1?

Yes; teacher evaluation is a continuous process. Although most evaluations will be officially conducted prior to February 1, due to the continuing contract provisions, in some cases it may be necessary to re-evaluate a teacher after February 1.

5. May a principal utilize supplementary evaluation systems assistance?

Yes; when it is felt that additional assistance is needed, other administrative staff may be consulted to assist in evaluation of a teacher.

6. May principals evaluate all personnel annually?

Yes; however, evaluation of nonprobationary personnel is only required once every three years.

7. Are preconferences required?

No, but the practice of preclassroom observation conferences is encouraged.

8. Are administrators required to write teacher performance objectives as a consequence of teacher evaluations?

Not under the provisions of the negotiated Comprehensive Agreement. However, competent administration dictates that objectives be written when an area of weakness has been observed and improved performance is desired.

9. What type of objectives should be written?

All objectives must identify what is to be accomplished, how it will be achieved, when it will be completed, and how mastery will be documented.

10. Must the evaluator complete all three performance areas each time the instrument is used?

No, unless it is the final evaluation that will be discussed at the personnel conference held prior to February 1.

11. Must a composite evaluation be given each time the instrument is used?

No, only when all three performance areas are observed should a composite rating be given. However, prudent administration dictates that employees subject to termination must have an extensive record of composite evaluations.

12. Must an evaluator use the Comments section of the instrument?

Comments are encouraged as a means of feedback on performance and for commendation.

12-81

Assistance Team



**Des Moines Public Schools
Des Moines, Iowa**

DES MOINES PUBLIC SCHOOLS
Superintendent's Office

ASSISTANCE TEAMS

The purpose of any evaluation system is to insure the best possible instruction and learning environment is provided the students of this district. Through a formal evaluation process administered by trained evaluators, the strengths and weaknesses of the instructional staff are identified.

The Des Moines Independent Community School District has taken the process of evaluation to the next level of implementation. A process has been developed to provide certified staff members with documented weaknesses and the assistance and support necessary for them to improve their instructional skills to an acceptable level. This process is the Assistance Team.

The Assistance Team is instituted whenever an instructional staff member is evaluated as less than meeting the established standards of the District. The accompanying booklet describes this process in detail. The Assistance Team, which is voluntary to the teacher, is kept intact until the instructional staff member meets the standards of the district or is removed from the classroom environment.

The Assistance Team program has been in existence for two years in this district with wide support for its purpose and respect for its accomplishments throughout the professional staff.

This district feels a deep commitment to assure that each student has the benefit of a quality instructional program. At the same time, we feel a responsibility to provide intensive, prescriptive assistance to the instructional staff who have been evaluated as less than meeting district standards.

DES MOINES PUBLIC SCHOOLS

PROCEDURE FOR ASSISTING TEACHERS WHOSE PERFORMANCE HAS
BEEN EVALUATED AS "NEEDS TO IMPROVE"

The "Assistance Team" concept is based upon the following procedures that are considered basic and should remain constant:

1. The building principal is the prime evaluator of teachers' performance.
2. The executive directors, their assistant directors and the executive director of personnel form the evaluative support team to building principals for teacher evaluation.
3. Content area supervisors may become involved in the performance evaluation through the invitation of the building principal.
4. The curriculum division serves as a resource to develop and extend intervention strategies.

Assistance Team

The assistance team is designed to provide optimum support for a teacher when a principal has determined that the teacher's performance is not satisfactory. When a teacher's performance has been evaluated as "needs to improve", the principal may request the assistance of a support team to help the teacher make the required improvement in order to continue teaching in the Des Moines Public Schools.

Procedures:

<u>Step</u>	<u>Activity</u>
1.	The principal must have evaluated a teacher's performance as "needs to improve."
2.	The principal shall request that the director of curriculum appoint a team of support personnel to work with the teacher needing to make improvements. The request must be in writing and contain specific recommendations citing where improved performance is required. (Use district "Improvement Plan" forms)

StepActivity

3. The assistant directors of elementary and secondary will serve as the chairperson of the support team and will work with the teacher until the necessary improvements have been accomplished.

The supervisor of staff development, at the request of the support team, will assist in the development of a professional improvement plan for the teacher.

All other team members will work directly with the teachers and principal to observe classroom instruction, to make recommendations for improvements and to monitor progress.

4. The team will disband upon the successful completion of the professional improvement plan or when assistance is no longer needed.

TEACHER IMPROVEMENT PLAN FOR _____

DATE _____

I. DIAGNOSIS

Problem (statement)

The teacher needs to improve her performance in planning, classroom organization, use of instructional techniques and her attitude towards students. Long-range and daily plans are not consistent with Des Moines objectives. There is little or no provision for individual differences through teaching strategies or use of resource materials.

Diagnosed by whom? _____

II. SPECIFIC OBJECTIVES FOR IMPROVEMENT

1. The teacher will during the 1982-83 school year maintain a positive learning climate and exhibit a concern for students as documented by observations of the principal.
2. The teacher will during the 1982-83 school year prepare long-range and daily lesson plans consistent with manuals, Des Moines based objectives and the use of appropriate instructional activities as documented by observations of the principal and lesson plans on file in the classroom.
3. The teacher will during the 1982-83 school year use a variety of instructional techniques to meet the needs of students as documented by observations of the principal and lesson plans on file in the classroom.
4. The teacher will during the 1982-83 school year become knowledgeable of course content and will organize the subject matter sequentially with the appropriate pacing as documented by observations of the principal and plans on file in the classroom.

III. PROCEDURES AND/OR RESOURCES FOR ACHIEVING OBJECTIVES

1. The consultant and supervisor will work in cooperation with the teacher to develop long-range and daily lesson plans consistent with Des Moines objectives and manuals used in the classroom.
2. The consultant and supervisor will review the assertive discipline procedures used in the primary unit and will assist in the implementation of the program.
3. The consultant and supervisor will provide assistance to the teacher in becoming more knowledgeable of the subject matter, use of teaching techniques and appropriate use of resource materials
4. The consultant and supervisor will arrange for a classroom visitation to observe planning, organization of instruction and a positive classroom climate.

IV. APPRAISAL METHOD AND TARGET DATE FOR ACHIEVEMENT

Observations by the principal(s)

Review of long-range and daily lesson plans

Review of positive reinforcement and consequences relative to the classroom assertive discipline program

Review Dates November, 1982 March, 1983
January, 1983 April, 1983
February, 1983

Target Date May, 1983

 PRINCIPAL

 TEACHER

TEACHER PERFORMANCE OBJECTIVES

The teacher will during the 1982-83 school year seek counseling to develop confidence, maintain self-control and gain independence as a classroom teacher as documented by verification that assistance was obtained and by observations by the principal(s).

During the 1982-83 school year, the teacher will have weekly positive communication with parents and students as documented by student papers on file and a list of parents' names and dates indicating when contacts were made.

During the 1982-83 school year, the teacher will develop long-range and daily lesson plans as documented by these plans on file in the teacher's classroom.

Beginning immediately, the teacher will be at work on or before 8:15 a.m. each day as documented by a log of arrival times kept by the principal.

Beginning immediately, the teacher will evaluate student progress as documented by sharing with the principal two graded papers sent home per week and one or two recorded grades per subject each week.

The teacher will by November 30, 1982 prepare and teach to instructional plans consistent with manuals, curriculum objectives, and ability levels of students as documented by plans on file and observations by the principal(s).

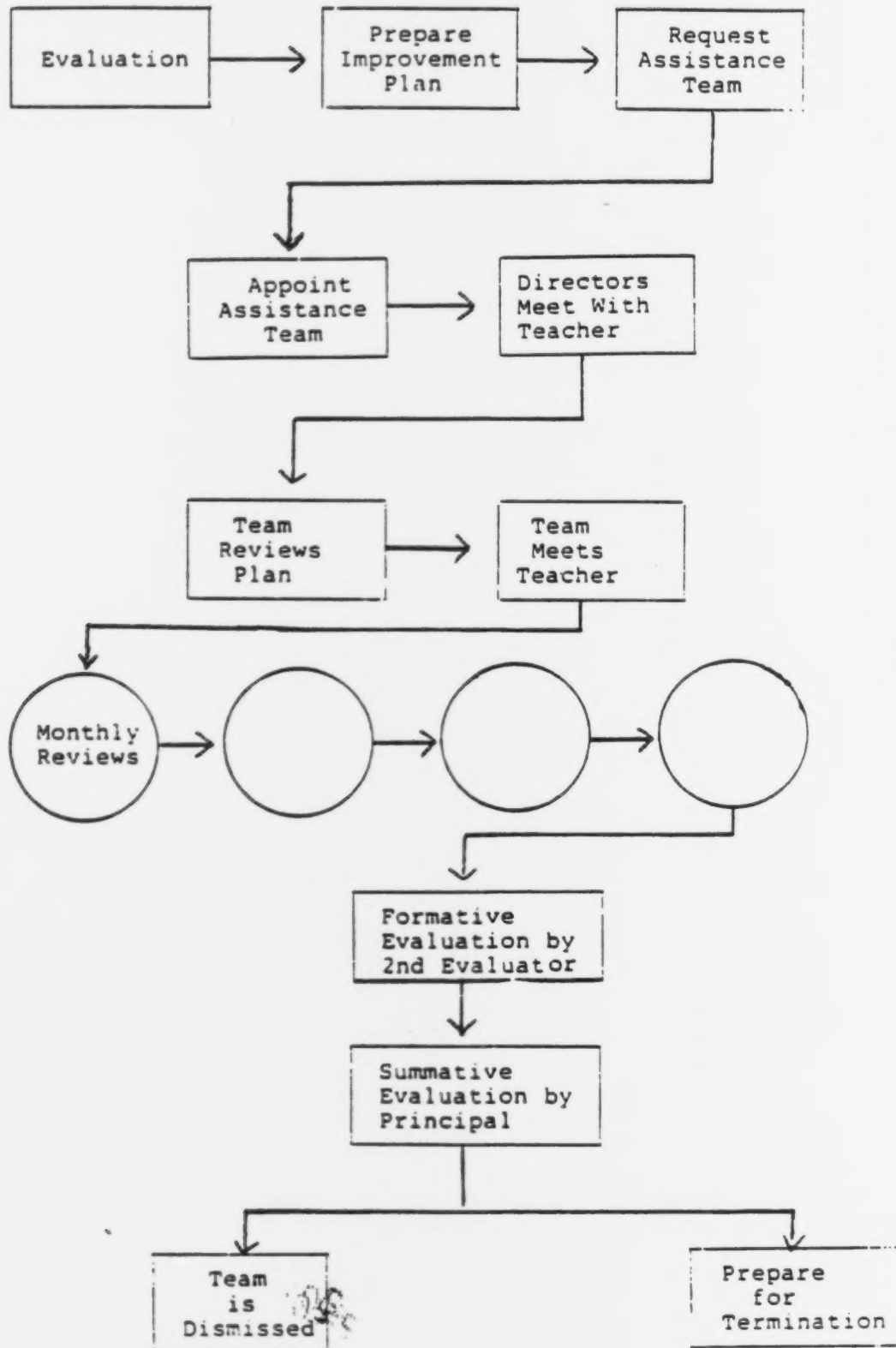
The teacher will during the 1982-83 school year maintain a positive learning climate and exhibit a concern for students as documented by observations of the principal(s).

The teacher will during the 1982-83 school year become knowledgeable of course content and will organize the subject matter sequentially with the appropriate pacing as documented by observations of the principal and plans on file in the classroom.

Content of objectives:

Person performing the function
Activity to be performed
Time mastery is to be achieved
How success is to be measured

A-200
MONITORING THE PROCESS



EMPLOYMENT STATUS OF TEACHERS

<u>Status</u>	<u>Number</u>
Reinstated as a satisfactory teacher	12
Currently working with a team	9
Presently on disability leave	1
Retired due to disability	1
Accepted an associate position	2
Resigned from teaching	4
Contract terminated	<u>1</u>
Total	30

VALUE OF ASSISTANCE TEAMS

The team offers support and credibility to the evaluation already done by the principal. I feel the assistance teams are one of the most positive things we have done for teachers who need assistance both in terms of public relations with staff and improving the over-all quality of instruction in the Des Moines Public Schools.

--Supervisor

Although I was appointed to several assistance teams, only one functioned to completion of the task. Other persons resigned or retired. I feel somewhat uncertain about the actual value, believing that a sense of pressure on the teacher may have been more effective than the team's aid.

--Supervisor

In two out of three situations, the assistance team has been extremely valuable. They have provided many ideas to teachers for use in the classroom, have followed through by contacting teachers on a regular basis and have kept principals informed of their work with the teachers.

--Principal

The team has been very valuable to me as I worked with teachers who seriously need to improve their teaching performance. The professional status of the team is excellent. The monthly meeting of the assistance team is a valuable communication for the principal.

--Principal

Statement to the community that such a system exists to improve educational opportunities for students.

--Consultant

TEACHER IMPROVEMENT PLAN FOR _____

DATE _____

I. DIAGNOSIS

Problem (statement)

Diagnosed by whom? _____

II. SPECIFIC OBJECTIVES FOR IMPROVEMENT

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or printed text on the paper. A small, dark smudge or mark is visible near the bottom center of the page.

III. PROCEDURES AND/OR RESOURCES FOR ACHIEVING OBJECTIVES

IV. APPRAISAL METHOD AND TARGET DATE FOR ACHIEVEMENT

Review Dates

Target Date

PRINCIPAL

TEACHER

ASSISTANCE TEAM LOG OF ACTIVITIES

Teacher _____

Date of Meeting _____

Persons Present:

_____	_____
_____	_____
_____	_____

Summary of Meeting:

Recommendations:

Next Meeting: _____

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SECTION VI.
THE EVALUATION PROCESS AND THE ROLE OF THE PRINCIPAL

Section 279.14 provides:

The board shall establish evaluation criteria and shall implement evaluation procedures. If an exclusive bargaining representative has been certified, the board shall negotiate in good faith with respect to evaluation procedures pursuant to chapter 20.

Section 20.9 of the Code of Iowa provides that:

The public employer and the employee organization shall meet at reasonable times, . . . to negotiate in good faith with respect to . . . evaluation procedures, . . .

The requirement that the board shall establish evaluation criteria and implement evaluation procedures is significant. Any board that does not have a policy requiring evaluation should establish such a policy, including evaluation criteria. The board should direct the administration to implement evaluation procedures. The administrator should carefully review current evaluation policies and practices, standards and criteria, and work with the board to refine, redevelop, or develop evaluation criteria.

Evaluations serve two purposes. One is educational. It is helpful for the purpose of pointing out specific deficiencies and prescribing possible remedies to teachers who are performing inadequately. If used properly, it can help teachers who aren't meeting their district's current standards to become better teachers. In addition, it can help improve teaching skills of those teachers who have been evaluated as satisfactorily meeting their district's standards.

The second purpose is evidentiary and is most crucial in termination cases. A good evaluation procedure properly applied can eliminate potential viable defenses in many termination cases.

For instance, to prove incompetency of a teacher, a district must generally demonstrate more than an isolated event unless that event constituted an unusually-flagrant activity. Normally, the district must show a pervasive pattern of behavior which resulted in an adverse effect on the school district. Evaluations, whether they be formal or informal, are the best means of evidencing a teacher's persistently-unacceptable behavior.

This is an especially good method of proof if, as in most contracts, the collective bargaining contract requires that an employee be furnished with a copy of the documentation and that he be afforded the opportunity to respond to it. Although remediation is not required under the Iowa statute as a condition precedent to termination, good administrative practice dictates that performance deficiencies be pointed out to the teacher in a series of evaluations and over a reasonable period of time. If such evaluations are made periodically and the results therefrom are communicated

to the teacher, the district can show both that the teacher's performance is not up to standard and that the teacher failed to improve his performance despite having been given fair notice of performance deficiencies.

It is for the foregoing reasons that the importance of strict evaluation procedures cannot be overemphasized. Once a school administrator becomes aware that a teacher is not performing up to district standards, at least one formal evaluation should be completed and a conference regarding that evaluation take place prior to notice and recommendation to terminate. This will serve as an indicator as to why the teacher is not meeting those standards which the school district has set out as being necessary for acceptable teaching.

While strict adherence to evaluation procedures is probably most crucial in regard to terminations due to the fault of the teacher, they are also very helpful in staff reduction cases where the determination as to which teacher will be reduced is to be based on respective qualifications of teachers. It is for these reasons that sufficient evaluations should be maintained at all times on all teaching staff members.

It is a management prerogative to determine the substance or essence of an evaluation. Western Hills Area Education Agency 12, PERB Case No. 1659 (ERG 6-404a (4/80)) Section 279.14 and the earlier Dubuque-Bettendorf decision before the Public Employment Relations Board, Case Nos. 598 and 602 (ERG 6-101), makes it clear that the establishment of evaluation criteria is a management prerogative. Employees under collective bargaining have only the right to negotiate the procedures or manner in which management's evaluation of them is accomplished. The standards or criteria to be applied in that evaluation are to be developed by the board and management, although districts may want to work informally with teachers on this task.

It is important to note the distinction between the establishment of evaluation criteria and the implementation of evaluation procedures. If a school district is not under the duty to bargain, that is, if there is no bargaining unit determined and there is no employee organization certified as the exclusive representative of the employees in the bargaining unit, then the evaluation procedures will be established by board policy. If the school district is under the duty to bargain, then the evaluation procedures must be negotiated. Where there is a collective bargaining representative, districts will need to be aware of the distinction between criteria and procedures, particularly to avoid making a unilateral change in procedures which could subject the school district to a prohibited practice charge under the collective bargaining law.

Pursuant to §279.15(2), second unnumbered paragraph, the teacher shall have access to the teacher's personnel file. The statute requires that "all periodic evaluations between the teacher and appropriate supervisors" shall be in that file. The words "all periodic evaluations" are all-inclusive, and any evaluations or observations which will be relied upon by the administration in a termination proceeding must be in that file. This may include both formal and informal evaluations and informal written observations.

Because the statute requires that the teacher have access to the personnel file at the time of termination, including all periodic evaluations, school districts should review their procedures for filing both formal and informal written evaluations or observations.

The role of the principal, immediate supervisor, or other first-line evaluator, becomes crucial in the termination process. Principals must be aware of ambiguous

statements in evaluations such as, "I am pleased with your dedication and willingness to follow instructions," and, "You are really showing great effort to try to improve; however, your class is undisciplined, totally out of order, your teaching presentation is not cohesive, is boring, and incomprehensible to the students, and your classroom does not have any semblance of a learning atmosphere." This exemplifies a management technique of the "carrot and stick" approach. As evidence, these types of comments may indicate something other than what the principal is actually trying to convey; namely, that the teacher's performance is not satisfactory or up to the school district's standards.

If a principal observes teaching conduct which is not up to the school district's standards, it should be noted and observed. Meritorious conduct can also be recorded or properly rewarded in the school district. Good management would dictate this. However, if a person is receiving a negative evaluation, a written evaluation should reflect the intent of the observation of the principal so that it is not clouded by "sweeteners". If "sweeteners" are to be used, those can be used orally in the conference to urge the teacher to improve an otherwise faulty performance.

If the teacher requests a hearing before the board, the principal can be expected to be asked by the superintendent to present his or her observations to the board to explain the evaluations and to present any evidence relevant to the termination proceedings from the principal's standpoint. The primary basis for the principal's testimony before the board will be the evaluations and observations by the principal of the teacher's duties and the written evaluations and observations that have been placed in the teacher's file. The principal will not necessarily be restricted to testify only on the written evaluations and observations in the file, but any testimony, oral recollections and the principal's credibility will all be strengthened by having thorough and complete written observations and evaluations in the file.

The principal will be subject to cross-examination by the teacher or the teacher's representative. Therefore, the principal should carefully prepare and review the facts prior to the hearing and prior to the time that documentation and a list of witnesses is provided to the teacher, (which is five days before the hearing), to make certain that no facts are overlooked or omitted which might be pertinent or essential to the termination proceeding. The principal will want to make certain that any explanation that is given at the hearing is consistent with the prior written observations by the principal or prior statements made by the principal, whether written or oral.

It should be noted that the termination law clearly maintains the board's position as a decision-maker in termination cases. The law seeks to assure that the board will be "an impartial decision-maker."

While mere familiarity with the facts of the case gained by the board in the performance of its statutory role will not disqualify it as a decision-maker, involvement by the board in pre-hearing evaluation or investigation of the facts, urging by the board of particular administrative action, or active participation by the board in the prosecution of a termination, could result in charges by the teacher that the board had lost its ability to be an impartial decision-maker. Such an allegation could, if proved, cause an adjudicator or a court to reverse a board decision. Therefore, teacher evaluation and the development and prosecution of the case should be conducted by school administrators, leaving the decision-making process to the board.

Some recent cases emphasize the evidentiary importance of evaluation procedures and the manner in which courts tend to treat those procedures.

The recent Nebraska case Sanders v. Board of Education of South Sioux City Community School District, illustrates the importance of proper evaluation in a termination proceeding based on neglect of duty or incompetency of a teacher. This case was cited earlier in this manual and was discussed in detail on pages 7-9. Having found no cause for termination, the teacher's contract was ordered reinstated.

The statements by the Iowa Supreme Court in Board of Education of Fort Madison Community School District v. Youel, 282 N.W.2d 677 (1979) are also instructive. The court said:

The superintendent had the burden to establish the case against Youel in the first instance. Thereafter, Youel, like any other appellant, must demonstrate error.

Four reasons were given for terminating Youel's contract. They were: inattention to duty; negative attitude toward, and poor working relationship with, activities director; lack of cooperation with activities director; and improper handling of football program resulting in deterioration of program.

The board was limited to those in deciding Youel's fate. . . . This does not mean each must be considered separately and must itself amount to just cause. It means, rather, that when the record is considered as a whole the proof must show by a preponderance of the evidence that there is just cause for termination on the basis of the reasons stated. For instance, evidence of inattention to duty or lack of cooperation with the activities director (stated as separate reasons for termination) could well be important in deciding if there has been improper handling of the football program (another separately-stated reason).

The court found that there was improper handling of the football program resulting in deterioration of the program. The court reviewed all the testimony and evidence and found that the testimony and evidence in the record supported this conclusion.

Regular and periodic written performance evaluations are also very important in any action to terminate an administrator's contract. While the law does not specifically require these administrator evaluations, we think that good management practice dictates that school boards should adopt evaluation procedures and criteria for the district's administrative staff. Such evaluation should be tied closely to the "job description" of those persons being evaluated. We urge school boards to adopt job descriptions for their administrative personnel so that performance can be measured on the basis of assigned duties and responsibilities. Generally, it is the responsibility of the superintendent to evaluate the performance of other school administrators. The school board should conduct the evaluation of the superintendent's performance.

In the Briggs case, (Briggs v. Board of Directors of the Hinton Community School District, 282 N.W.2d 740) the court said:

In the case before us the board's notice to Briggs indicated that "continued deficiencies (incompetency) in the areas of staff evaluation, program evaluation, and decision-making" constituted just cause to consider termination.

The court noted that there was substantial evidence in the record to establish the nineteen findings of fact in the areas of teacher supervision, student discipline, decision-making, and long-range planning difficulties. Negative evaluations filed by the superintendent were important to sustaining the findings.

In the Ar-We-Va case, (Ar-We-Va Community School District v. Long and Henkenius, Ct.App.Iowa, ___ N.W.2d ___ (1980) the Court of Appeals said:

The principal testified as an expert witness regarding the evaluation of teachers. He concluded from his evaluation that Long and Henkenius ranked lower in relative skill, ability, competence, and qualifications than the other elementary teachers. The board is entitled to rely on the testimony of its own expert witness.

In short, to establish just cause, the underlying facts must be completely developed, and evaluation will be important in developing those facts.

The court ruled evidence was sufficient to establish "just cause," for a teacher contract termination in Davis v. Board of Education of the School District of Callaway, 203 Neb. 1, 277 N.W.2d 414 (1979). The court upheld the termination of a teacher who was dismissed for lack of discipline in the classroom, lack of organization and lack of control over students. The court noted that the testimony of the expert witnesses (the school superintendent and the principal), was that her performance did not meet the appropriate standard.

In the case of Vorm v. David Douglas School District, 608 P.2d 193 (1980), plaintiff was dismissed as a permanent teacher by the school district on grounds of inadequate performance. The teacher argued that "inadequate performance" is a statutory term which requires interpretation or definition through standards adopted by the school district, and that the agency's findings and conclusions relating to the adequacy of the teacher's performance were insufficient, absent the existence of such standards or absent the articulation of the applicable standards in the agency's order. The court agreed that the statute required that in determining whether professional performance of a teacher was adequate, consideration should be given to regular and special evaluation reports prepared in accord with the policy of the employing school district and any written standards of performance which had been adopted by that school district. However, the court further stated that it was clear the legislature had conferred on the districts the authority, if not the requirement, to adopt standards of performance. Here, the district did adopt standards as a part of an evaluation manual. Therefore, the court found no error in failing to articulate standards in the order where there was only one body of standards it could have considered or applied in determining the teacher's inadequacy.

The substance of the court's holding was that so long as standards are clearly established and in written form they need not be articulated in the agency's final order.

The case of Board of Directors of Riverside School v. Carmody, 408 A.2d 885 (Pa. Cmwlth. 1979), offers an interesting twist when termination concerns a staff reduction rather than termination for incompetency. Its holding may be useful as persuasive authority. However, it is not recommended that it be followed as a routine procedure. Carmody was a staff reduction case in which the determination of who to reduce was based first on the teachers' relative qualifications, and if those were

substantially the same, then reduction would be based on seniority. The teacher who was reduced had a qualification score of 85. The next lowest qualification score was 108. This was adjudicated to be a substantial difference and, therefore, seniority was not taken into account.

The Court of Common Pleas found the ratings to be defective due to the lack of anecdotal records. (evaluations) The appellate court distinguished the staff reduction situation from termination based on incompetency. It based its distinction on the fact that in a staff reduction instance, the teacher had received satisfactory ratings, where in the incompetency case, the teacher would have received unsatisfactory ratings. The court stated:

While unsatisfactory ratings must be supported by particularized appraisals, such extensive efforts and documentation are not necessary for satisfactory ratings.

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III. EVALUATIONS AND EVIDENTIARY MATTERS.

In Dobervich v. Central Cass Public School District, 302 N.W.2d 745 (N.D. 1981), a teacher objected to the fact that evaluations made in prior years were relied upon by the Board in making its decision to terminate him. The teacher had received no notice that the evaluations were going to be relied upon. However, at trial the teacher himself relied on the positive aspects of those evaluations, and the court therefore held that there was no denial of the teacher's statutory rights.

Lubeck v. Sac Community School District, No. 1-292, 2-265647 (Iowa Ct. App. Dec. 30, 1981), is a recent Iowa Court of Appeals case involving the termination of a teacher. In Lubeck, the teacher alleged her termination was improper because, among other things, her complete personnel file was not compiled in one place and therefore "available" in accordance with §279.15(2), at the time of her termination notice. Rather, the teacher's formal evaluation instruments were filed and maintained separately from her personnel file. The court, however, upheld the termination finding that the teacher did not request a copy of her personnel file until two (2) days prior to her termination hearing at which time her file was complete and in compliance with the statute. The court expressly did not reach the question of what result had the teacher requested her file at an earlier date when the documents were not assembled.

In Lubeck, the teacher was recommended for termination because of tardiness, lack of self control, and because of problems with her method of teaching. None of these problems were reflected in the teacher's formal evaluation instrument. However, the court accepted oral testimony on each of these points and upheld the termination even though, as mentioned above, §279.15(2) was not strictly complied with and although formal evaluations did not reflect her deficiencies. (It should be noted that the teacher was given oral notice of her deficiencies prior to her recommendation for termination.)

The following case is important in that it demonstrates the importance of presenting consistent, well substantiated evidence in a teacher termination case. In Hollingsworth v. Board of Education of the School District of Alliance, 208 Neb. 350, 303 N.W.2d 506 (1981), a teacher was recommended for termination for, 1) incompetence; 2) neglect of duty; 3) unprofessional conduct; and 4) other conduct which interfered substantially with continued performance of duties.

As specific instances supporting these reasons, the recommendation for termination stated:

1. "You frequently left your classroom unattended."

The evidence produced at the hearing indicated that the teacher left his classroom unattended only once, and this was after he

had received a severe electrical shock from machinery in his classroom.

2. "You have been unable to control your classroom."

Evidence showed that 22 of 25 student referrals to the administration for discipline came only after the teacher received his notice of recommended termination.

3. "You have been unable to handle student misbehavior."

See response to No. 2.

4. "You lack rapport with students."

Evidence showed some students poured sugar into the teacher's gas tank. Evidence also showed the teacher was evaluated poorly by students in a survey which the administration conducted. However, the teacher's principal admitted that many students may have been aware of the impending termination proceedings at the time of the survey and that knowledge of this fact may have affected their responses.

5. "You do not have a good relationship with fellow staff members."

The teacher testified that he did not enjoy drinking and therefore stopped going to weekly poker games attended by staff members. His athletic director testified that while his relationship with other staff members was not optimum, the teacher had made a marked improvement to improve these relationships over the prior year.

6. "Your personal appearance (odor) has interfered with your performance."

The teacher testified that he had recently spent \$2,000 on dental work, and part of the reason for his body odor was that his classroom was often 80 or more degrees.

Evidence also showed that classroom observations and comments resulting therefrom contained many laudatory remarks, and only what appeared to be incidental criticism. The complementary remarks in some cases directly contradicted those reasons given by the administration for termination. The teacher's principal admitted that the teacher put in very long hours in preparing for his classes. In addition, the principal admitted that he did not compare this teacher's performance with the performance of other teachers when recommending Mr. Hollingsworth for termination.

In viewing the entire record, the court stated at page 512-513, "Incompetency or neglect of duty are not measured in a vacuum, nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties."

In overturning the dismissal, the court referred to the superintendent's case as a, "house of straw which could not stand the fresh breeze of careful analysis."

This case is important for a variety of reasons. First, it points out the necessity of properly evaluating a teacher. It is important in evaluating teachers that deficiencies are noted and that any favorable remarks do not contradict remarks concerning those deficiencies. If an evaluation is extremely favorable overall, it loses its effectiveness with regard to pointing out teacher deficiencies. This is not to say that favorable remarks should not be recorded in evaluation instruments. If a teacher is doing a commendable job overall, his or her evaluation should reflect that. However, if the teacher needs to improve, favorable comments should not contradict or overwhelm the critical remarks.

Secondly, the case points out the importance of the adequacy of the actual "Notice of Termination." It is crucial that these notices contain reasons which can be substantiated by well-documented evidence. It is also crucial that these reasons will not be emasculated by evidence which contradicts or overrides the reasons for termination.

Finally, the case points out the importance of evaluating teachers with respect to the performance of other teachers. No teacher is expected to perform perfectly. All teachers should be treated similarly in the evaluation process. In evaluating, an attempt should be made to avoid appearing as though one teacher is being singled out or treated more harshly than others. A termination case will simply not stand up if it does not meet these minimal requirements.

In the case of Lithun v. Grand Forks Public School, 307 N.W.2d 545 (N.D. 1981), the teacher was dismissed for insubordination and gross deficiency with regard to the school's policy concerning corporal punishment. Mr. Lithun objected to the introduction of evidence of events which occurred in prior years as grounds for his dismissal. The teacher further asserted that the occurrences of the present year alone would not constitute just cause for the termination of his contract.

The court agreed that if such incidents of corporal punishment were considered in isolation, there may not have been sufficient basis for termination. However, the board was not required to ignore similar events occurring in past years because when all of these events were considered together, they formed an emerging pattern. The court stated:

The school administration was entitled to consider these smaller past events which marked that pattern . . . those past events were a part of the evidence which the school board used to illustrate that Lithun had received directives as to his use of physical force to discipline his students.

This case is very important with regard to the use of past years' evaluations to support this year's termination. It should be noted that past years' evaluations should primarily be used for two purposes. The first purpose is to indicate that the teacher has established a pattern of behavior over the years, which would indicate that the inappropriate behavior will continue if the teacher is allowed to continue in the same employment situation. The second reason past events should be used to support this year's termination is to establish the fact that the teacher has been given prior notice of the inappropriateness of his or her behavior. This bolsters the fact that the teacher's due process rights have been satisfied.

In the case of Trimboli v. Board of Education of Wayne City, 280 S.E.2d 686 (W. Va. 1981), the West Virginia court stated that failure to follow the evaluation procedure outlined in board policy prohibited the board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency, that had not been called to the attention of the employee through evaluation, if that behavior was correctable. This portion of the case speaks to the notice to which the teacher is entitled concerning inappropriate behavior prior to disciplinary action. It is clear, from this case that the West Virginia law requires remediation prior to discipline for correctable actions.

The court in Trimboli also found that evaluation procedures must be complied with prior to disciplining an employee. One of the reasons given for this requirement is the fact that school boards do not generally possess the qualifications to evaluate professional competency. The court stated that it is therefore improper for a school board to dismiss an employee for incompetency without an evaluation by someone qualified to render an opinion on the matter. This aspect of the case is important in that it establishes the function of the school board in termination proceedings. Boards should not become involved in what is appropriately left to administrators who are experts trained to evaluate teachers. Rather, the function of the board should be judicial in nature. That is, the board should decide based on the evidence presented by the experts, if there is sufficient cause to terminate a teacher's contract.

A.3 TEACHER TERMINATION AND GRIEVANCE HEARINGS

A.218

(Note: A-217 omitted-no copy on this page)

REASONS FOR AND DOCUMENTS TO SUPPORT
THE PROPOSED TERMINATION OF WILLIE WON'T MAKEIT *

I. Classroom management

- A. Insufficient active, quality-level participation generated among students by means of probing, follow-up questions. Insufficient use of questions that ascertain students' achievement of mastery of content beyond primarily the knowledge level (recall of facts, opinions). Insufficient use of questions that ask students to defend or to support opinions of their own or judgments of others. Documents Nos. 4, 15, 23, 24, 28, 33, 34, 37, 43, 44, 56, 57, 111, 136.
- B. Insufficient correlation of class activities (lecture/discussion and/or questioning techniques) to course objectives. Insufficient communication to students of what they are expected to do with the information being presented. Documents Nos. 4, 15, 24, 33, 37, 56, 57, 136.
- C. Lack of coherence in oral use of language, errors in pronunciation or usage. Documents Nos. 23, 34, 56, 111, 136.

II. Unclear directions, statements or questions on information provided to students or presented for distribution to the public. (See Attachment I, page 2).

- A. Directions or statements that are unclear, vague or lack coherence. Documents Nos. 14, 45, 46, 47, 48, 49* (also 52, 54), 53, 57, 71, 72, 73, 92, 99, 106, 109, 110, 116, 134, 144. Inaccurate use of language, inattention to details. Documents Nos. 16, 139, 142, 145.
- B. Questions that are unclear, vague or lack coherence. Documents Nos. 28, 33, 59, 63, 64, 65, 68, 71, 72, 73, 75, 76, 81, 82, 90, 94, 100, 102, 103, 104, 111, 112, 113, 114, 136.

* This outline document can be prepared for use in termination hearings where performance in teaching is the basis for termination. The documents referred to in this outline can be attached with the appropriate passages highlighted for easy review by the hearing officer.

I.	II.	III.
II. <u>Identification of Concern</u>	<u>Assistance, Directors, or Recommendations</u>	<u>Recurrences</u>
A. Directions or statements that are unclear, vague, or lack coherence 47 - 1/8/85 in Service (Wilcher) (12/10/85 request to submit written materials to division chairman) 57 - 2/15/85 Summary Communication	14 - 3/9/83 Art show announcement 16 - 6/1/83 Proposed field trip to Surfside on 7/4 45,46 - 12/20/84 & 1/8/85 Brochure for faculty art show 48 - 1/4/85 Note to file re: press release 47 - 1/8/85 In Service 49 - 1/14/85 Instructions to students (also 52, 54) 53 - 1/23/85 Note re: handout of table of contents outline 57 - 2/15/85 Summary Communication 72 - 3/27/85	49 - 1/14/85 (also 52, 54) 71 - 3/26/85 73 - 4/2/85 92 - 7/1/85 99 - 7/16/85 106 - 7/30/85 109 - 7/1/85 110 - 8/6/85 139 - 3/27/86 140 - 4/8/85 144 - 4/28/86 145 - 4/29/86
B. Questions that are unclear, vague, or lack coherence 28 - 2/27/84 (Pugh, Wilsher) In Service 33 - 4/9/84 (Pugh, Wilcher) In Service 59 - 2/18/85 Exam	59 - 2/18/85 64 - 2/25/85 65 - 2/28/85 68 - 3/5/85 71 - 3/26/85 72 - 3/27/85 90 - 6/25/85	59 - 2/18/85 63 - 2/22/85 65 - 2/28/85 73 - 4/2/85 75 - 4/11/85 76 - 4/12/85 81 - 4/24/85 82 - 6/11/85 90 - 6/25/85 94 - 7/8/85 100 - 7/18/85 102 - 7/23/85 103 - 7/23/85 104 - 7/26/85

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I.	II.	III.
I. <u>Identification of Concern</u>	<u>Assistance, Directors, or Recommendations</u>	<u>Recurrences</u>
A. Ineffective classroom questioning strategies, lack of student participation *4 - 9/20/82	*15 - 4/20/83 *23 - 1/30/84 24 - 2/1/84 28 - 2/27/84 33 - 4/9/84 *34 - 4/4/84 37 - 5/21/84 *43 - 10/5/84 44 - 10/19/84 57 - 2/15/85 136 - 3/12/86	*23 - 1/30/84 *43 - 10/5/84 *56 - 2/8/85 *111 - 11/25/85 136 - 3/12/86
B. Correlation of class activities to course objectives *15 - 4/20/83	*15 - 4/20/83 *34 - 4/9/84 *56 - 2/8/85 57 - 2/15/85 *111 - 11/25/85 112 - 11/26/85 (12/4/85 to Hayes) 136 - 3/12/86	*34 - 4/9/84 *56 - 2/28/85 *111 - 11/25/85 112 - 11/26/85 136 - 3/12/86
C. Lack of coherence in oral language - errors in pronunciation or usage *23 - 1/30/84	*34 - 4/9/84 *56 - 2/8/85 *111 - 11/25/85 136 - 3/12/86	*111 - 11/25/85 56 - 2/8/85 136 - 3/12/86

* Classroom observation reports

DISMISSAL UNDER SECTION 13.109
OF THE TEXAS EDUCATION CODE

SPECIMEN LETTER
FORM C-1
Termination of a Probationary or
Continuing Contract Teacher During
the School Year

(Date)

CERTIFIED MAIL
RETURN RECEIPT

Mr. or Ms. Continuing Contract Teacher
100 XYZ Street
Houston, Texas 77001

Dear Mr. or Ms. Teacher:

At the personnel meeting on (date), the Board of Education of the ABC Independent School District received my recommendation that your employment with the District be terminated. The Board authorized me to notify you that a proposal to terminate your employment with the District under Section 13.109(4) of the Texas Education Code and Section ___ of your (probationary or continuing) contract is pending before the Board. This letter is notification of the proposed termination of your employment with the District pursuant to the provisions of Section 13.111 of the Texas Education Code.

Section 13.109(4) provides that a school district may dismiss a teacher during the year for "repeated failure to comply with official directives and established school board policy." This proposed action is based on charges and statements made as third party input by students in your class and their parents regarding your use of disciplinary techniques in violation of Board policy. This proposed action is also based on your own admission to several of these incidents and the recommendation submitted by your principal. These specific incidents are reflected in your personnel file; however, they are also set forth in detail

below.¹ (Incidents should be listed by date and the nature of the incidents.)

If you desire to contest the proposed action to terminate your employment with the District, you must notify me in writing within ten (10) days after the date you receive this official notice. In the request for a hearing, you may specifically request that the hearing either be open or closed. If you fail to request a hearing within ten (10) days after receiving this notice of the proposed action to terminate your employment with the District, I will recommend to the Board of Education that it enter an order terminating your employment with the District. Until you have a hearing before the Board or you fail to request a hearing within ten (10) days after receiving this notice and the Board at a subsequent meeting enters an order terminating your employment, you continue to be an employee of the District.

If you have any questions concerning any of these reasons which support the proposed action to terminate your employment, please advise me in writing. It is my intention that you fully understand the reasons for this proposed action so you can determine whether you desire a hearing, and, if so, to assist you in preparing your case.

You may obtain copies of evaluation reports and memoranda touching or concerning your fitness or conduct as a teacher by requesting them in writing from (name), Personnel Director, at the above address.

(Since you are suspended without pay, if you should request a hearing, it will be held within fifteen (15) days unless postponed to a later date by your written consent.)²

¹The reasons should be as specific as possible, and a listing of specific instances with dates is desirable. When these are listed, all instances and dates which will be used against the teacher must be included. The reasons should be specific enough to give the teacher notice of the reasons and provide him or her enough information to prepare an adequate defense.

²Use if the teacher has been suspended without pay only. (This should be used only in extreme situations and only upon advice of counsel.)

If you have any questions regarding the procedures outlined above, please contact Mr. or Ms. Board Assistant at the above address.

Yours very truly,

General Superintendent

cc: President, Board of Education
Personnel Director
Board Assistant
Area (Assistant) Superintendent

bcc: School Board Attorney
Principal and Others

2KF3C

SPECIMEN LETTER
FORM C-2

Notice to a Probationary or Continuing
Contract Teacher Dismissed During the
Year of Board Action Resulting From
Failure to Request A Hearing Within Ten
Days After Notification of the Proposed
Action

(Date)

CERTIFIED MAIL
RETURN RECEIPT

Mr. or Ms. Continuing or
Probationary Contract Teacher
100 XYZ Street
Houston, Texas 77001

Re: Decision of the Board of Education to Terminate
Your Employment with the District

Dear Mr. or Ms. Teacher:

On (date) you were notified that the Board of Education had received the Superintendent's recommendation to terminate your employment with the District. In addition to being notified that the action to terminate your employment was proposed before the Board, you were notified of the grounds assigned for that proposal. You were also notified that you could request a hearing before the Board.

Under Section 13.114 of the Texas Education Code, you could have received a hearing before the Board of Education by requesting one within ten (10) days after receiving notification of the proposed action to terminate your employment with the District. Having failed to request a hearing within such ten (10) days, the Board, at its meeting on (date), entered an order terminating your employment with the ABC Independent School District immediately.

You have the right to appeal this action to the Commissioner of Education for review by him, providing you file notice of such appeal with this Board of Education with a copy mailed to the Commissioner within fifteen (15) days after you

receive written notice of this action taken by the Board.
Or, in the alternative, you may challenge this action by
suit brought in the District Court of Harris County within
thirty (30) days after you receive written notice of the
action taken.

Yours very truly,

President
Board of Education

cc: Continuing or Probationary
Contract Teacher
Area (Assistant) Superintendent
Personnel Director
General Superintendent

bcc: School Board Attorney
Principal and Others

2KF3D

SPECIMEN LETTER
FORM C-3

Notice of Hearing in the Termination of
a Probationary or Continuing Contract
Teacher During the School Year

(Date)

CERTIFIED MAIL
RETURN RECEIPT

Mr. or Ms. Continuing Contract Teacher
(or Teacher's attorney, if any)
100 XYZ Street
Houston, Texas 77001

Dear Mr. or Ms. Teacher:

Your request for a hearing before the Board of Education with respect to the proposed action to terminate your employment with the District was received on (date). Accordingly, you will be given a hearing before the Board on (date) at 7:30 p.m. The hearing will be conducted in the Board Room at the Administration Building; and, as requested, it will be open (closed) to the public.

The hearing will be conducted as any administrative hearing, and although the strict rules of evidence will not apply, the parties will be held to testimony which is relevant and not hearsay. You may be represented by counsel and will be given the right to present witnesses, documentary evidence, and make an oral argument. If you are to be represented by an attorney, please advise me within ten (10) days of the hearing. If you are not represented by counsel, the District's Administration will not be represented by counsel either. You will also be permitted to cross-examine witnesses offered by the District's Administration. In order to provide the most accurate record possible, a tape recording of the proceedings will be made.

As indicated in the letter of (date) to you from the General Superintendent, (name), the proposed action to terminate your employment is based on Section 13.109(4) of the Texas Education Code and Section ___ of your contract. Section 13.109(4) provides that a school district may dismiss a teacher during the year for "repeated failure to comply with official directives and established school board policy."

This proposed action is based on charges and statements made as third party input by the students in your class and their parents regarding the use of disciplinary techniques in violation of board policy. This proposed action is also based on your own admission to several of these incidents and the recommendations submitted by your principal, (name), and your Area Superintendent, (name).

At the hearing, the District's Administration will present the following witnesses:

1. Ms. Joan Principal of Junior Junior High School, will testify regarding disciplinary procedures used at Junior Junior High School, your use of discipline, and your performance as a teacher. The nature of her testimony is further reflected in the documents in your personnel file.¹
2. Mr. Junior Principal, Assistant Principal at Junior Junior High School, will testify regarding disciplinary procedures used at Junior Junior High School, your use of discipline, and your classroom activities. The nature of his testimony is further reflected in the documents in your personnel file.
3. Mr. Superintendent, Area Superintendent, will testify regarding disciplinary procedures used in the ABC Independent School District and generally regarding your use of discipline. The nature of his testimony is further reflected in the documents in your personnel file.

The District's Administration may call other witnesses. If so, you will be given an advance notice of the names of any additional witnesses and the nature of their testimony. These witnesses plus others, the identity of whom are not known at this time, may be called as rebuttal witnesses. The identity of these rebuttal witnesses and the nature of

¹The description of a witness' testimony should specifically identify the incidents or factors about which he or she will testify. The description of the testimony should be specific enough to provide the teacher with notice of the nature of the witness' testimony and provide the teacher an opportunity to prepare a defense.

their testimony cannot be determined until you present your witnesses at the hearing.

Since the District's Administration has provided you with this information, please supply the General Superintendent with a list of the witnesses you plan to call at the hearing together with a description of their testimony. Further, please provide the General Superintendent with copies of all documents you may present at the hearing.

The hearing will be postponed only upon your written request and the presentation of a justifiable reason for postponement. Should you have any questions regarding the hearing, the reasons supporting the proposed action to terminate your employment, the witnesses who will testify against you or the nature of the witness' testimony, please contact me.

Yours very truly,

Board Assistant

cc: General Superintendent
President, Board of Education
Area (Assistant) Superintendent
Personnel Director

bcc: School Board Attorney
Principal and Others

2KF3E

SPECIMEN LETTER
FORM C-4
Notice of Additional Witnesses

(Date)

CERTIFIED MAIL
RETURN RECEIPT

Mr. or Ms. Attorney (Or Teacher if
no Attorney)
Attorney at Law
300 Hill Street
Houston, Texas 77001

Re: Teacher

Dear Mr. or Ms. Attorney:

At the hearing on (date), the ABC Independent School District will call as additional witness Dr. Expert, Director of the Expert Department. Dr. Expert will testify generally regarding the discipline of students and the special educational problems connected with their discipline. His or her testimony will relate directly to the discipline policies of the District.

Yours very truly,

Personnel Director

cc: General Superintendent
President, Board of Education
Area (Assistant) Superintendent)
Expert
Board Assistant

bcc: School Board Attorney
Principal and Others

2KF3F

FORM C-5
Hearing Regarding the Proposal to
Terminate the Employment of a
Continuing or Probationary Contract
Teacher During the School Year

BOARD PRESIDENT:

Purpose of the Meeting

The purpose of this meeting is to consider the employment status of Mr. or Ms. Continuing Contract Teacher, a teacher at Junior Junior High School. The hearing was originally set for (date); however, Mr. or Ms. Attorney, Attorney for Mr. Teacher, requested that the hearing be postponed and submitted justifiable reasons in support of the request. Subsequently, we reset the hearing for tonight, (date). Dr. General Superintendent, what are the circumstances which have brought us here tonight?

GENERAL SUPERINTENDENT:

Background Information

On (date), I submitted a proposal to the Board that Mr. or Ms. Teacher's employment with the District be immediately terminated pursuant to Section 13.109(4) of the Texas Education Code and Section _____ of his or her contract. The Board instructed me to give him or her notice that a proposal to terminate his or her employment was pending before the Board.

After being advised of the proposal by letter of (date), Mr. or Ms. Teacher through his or her Attorney, (name), requested a hearing before the Board. By letter of (date) he or she was notified that this open (closed) hearing would be held on (date). The letter of (date) further specified the procedure which would be followed, the reasons given for the proposed action to terminate his or her employment, and the names of the District's witnesses and the nature of their testimony which will be presented at this hearing. Pursuant to the request of Mr. or Mrs. Attorney that the hearing be postponed, it was and is, of course, reset for this evening.

BOARD PRESIDENT:

Outline of Procedures to be Followed

This hearing will be conducted as any administrative hearing, and although no strict rules of evidence will apply we will hold the parties to testimony which is relevant and not hearsay. Mr. or Ms. Teacher is represented by Mr. or Ms. Attorney. Mr. or Ms. Attorney, you will have the right to present witnesses, documentary evidence, and make oral argument. You are also permitted to cross-examine the witnesses offered by the District's Administration, and the District's Administration may cross-examine the witnesses you present. The members of the Board may question either counsel or witnesses at any time; however, the members of the Board are not subject to questioning by either counsel or witness.

In order to provide the most accurate record possible of this hearing, a tape recording of the proceedings is being made.¹ Please avoid talking when others are speaking so the tape will adequately reflect the proceedings. For the record, Mr. or Ms. Teacher and his counsel, Mr. and Ms. Attorney, are present. The following Board members are present (list them), and the following District personnel are present (list them), and other parties present are (list them).

Pursuant to Mr. or Ms. Teacher's request, the hearing is open (closed) to the public.

The hearing will be conducted basically as follows: I will read the reasons which support the proposed action to terminate Mr. or Ms. Teacher's employment with the District. Mr. or Ms. (name), the Area (Assistant) Superintendent, and the School Board Attorney, Mr. or Ms. Attorney, and other witnesses may present their testimony and any documentary evidence they wish. After they have concluded their presentation, Mr. or Ms. Teacher's Attorney may present any witnesses and documentary evidence to disprove the grounds of the proposed action to terminate and to refute evidence offered by the school's witnesses. At the conclusion of Mr. or Ms. Teacher's case, the school attorney may make concluding arguments following which Mr. or Ms. Teacher's Attorney may make concluding arguments to the Board.

¹Alternatively, a court reporter may be used.

Mr. or Ms. Board Assistant (a Notary Public) will swear all witnesses and will receive and mark all exhibits and documentary evidence. To facilitate the offering of materials for evidence, please hand Mr. or Ms. Assistant a copy and allow sufficient time for him or her to mark it before proceeding.

Reasons Supporting the Proposed Action to
Terminate Mr. or Ms. Teacher's Employment

As indicated in the letters of (date) and (date), the proposed action to terminate your employment is based on Section 13.109(4) of the Texas Education Code and Section ____ of your contract. Section 13.109(4) provides that a school district may dismiss a teacher during the year for "repeated failure to comply with official directives and established school board policy". This proposed action is based on charges and statements made by the students in your class and their parents regarding your use of disciplinary techniques in violation of Board policy. This proposed action is also based on your own admissions to several of these incidents and the recommendation submitted by your Principal, (name), and your Area (Assistant) Superintendent, (name).

Polling of the Board for Qualification

After now having heard the allegations, it is time to determine the qualifications of the board members to serve as members of the hearing body. I will ask each member of the Board: "Can you consider the testimony and other evidence offered at this hearing and render a fair and impartial decision on the issues before this Board?" If anyone feels that he or she cannot do so, that board member should not participate in the hearing. (The President polls the Board).

Are there any questions regarding the manner in which this administrative hearing will be conducted?

The Hearing

Mr. or Ms. School Attorney, you may proceed with the school's presentation. (Mr. or Ms. Attorney makes his or her opening argument and calls witnesses.)

Ms. or Mr. Board Assistant will swear each witness as follows:

"Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth and nothing but the truth?"

Mr. or Ms. Teacher's Attorney, you may make your presentation. (Mr. or Ms. Attorney makes his or her opening argument, calls witnesses and presents other evidence.)

Mr. or Ms. School Attorney, you may make a rebuttal presentation.

Mr. or Ms. Teacher's Attorney, do you have anything in rebuttal?

Mr. or Ms. School Attorney, you may make your closing statement.

Mr. or Ms. Teacher's Attorney, you may make your closing statement.

If Mr. or Ms. Teacher's Attorney chooses to make a closing statement, Mr. or Ms. School Attorney should be allowed to make a short response.

Instructions Before Deliberation

Under Section 13.114 of the Texas Education Code, we may take such action and enter such order as we deem lawful and appropriate after we have heard the evidence. No order may be entered by this Board which is adverse to Mr. and Ms. Teacher except upon majority vote of the full membership of the Board. In other words, four Board members are required before any order adverse to the teacher may be entered.

If we feel the reasons given for the proposed termination of Mr. or Ms. Teacher's employment are supported by the evidence offered at this hearing, we may enter an order terminating his or her employment with the District immediately. As has been noted before, this hearing is not a criminal proceeding, and the proof necessary to sustain a termination is not beyond a reasonable doubt. Any action to terminate should, however, be supported by the preponderance or greater weight of the evidence offered at this hearing. In other words, if we find that the greater weight of the evidence supports the contention of the District's Administration that Mr. or Ms. Teacher violated Board policy in the use of disciplinary techniques, we may so find, and he or

she may be terminated. In considering the reason advanced for dismissal and the evidence supporting the reasons for it, we should consider only the evidence presented at this hearing and should not consider any rumor or information that has been heard outside the hearing room prior to the hearing.

Is there any discussion? (Discussion and questions among the Board members.)

Do I have a motion? (A motion to terminate or not to terminate or some other action should be made at this time. If the motion is to terminate, it is desirable that the motion recite certain factual findings upon which the motion to terminate is based.)

After discussion, if necessary, vote on the motion.

Advising the Parties of the Result

(If not terminated, use the following.) Mr. or Ms. Teacher, the Board has voted not to terminate your employment with the District. The proposal to terminate your employment with the District has been rejected, and you continue to be an employee of the District.

(If terminated, use the following.) Mr. or Ms. Teacher, the Board has heard the evidence presented tonight and has determined that your employment with the District should be terminated immediately. You have the right to appeal this action to the Commissioner of Education for review by him, providing that you file notice of such appeal with this Board of Education with a copy mailed to the Commissioner within fifteen (15) days after you receive written notice of the action taken here tonight. Or, in the alternative, you may challenge this action by suit brought in the District Court of Harris County within thirty (30) days after you receive written notice of the action taken. You will be notified in writing within the next several days of this action.

Conclusion of Hearing

(The letter notifying the teacher of the action of the Board should be prepared and signed by the General Superintendent or President of the Board of Education within the shortest period of time practical in the circumstances.)

2KF3G

241

SPECIMEN LETTER
FORM C-6
Notifying a Probationary or Con-
tinuing Contract Teacher That He
or She Has Been Dismissed During
the Year¹

(Date)

CERTIFIED MAIL
RETURN RECEIPT

Mr. or Ms. Attorney
Attorney at Law
300 Hill Street
Houston, Texas 77001

Re: Continuing Contract Teacher

Dear Mr. or Ms. Attorney:

At your request, the Board of Education of ABC Independent School District conducted a hearing on (date) with respect to the proposal to terminate Mr. or Ms. Continuing Contract Teacher's employment with the District. You appeared and represented Mr. and Ms. Teacher at the hearing. You presented witnesses and evidence in his or her behalf, cross-examined adverse witnesses, and made an argument. At the conclusion of the hearing, the Board found that the teacher had used disciplinary techniques in violation of Board policy and voted to terminate his or her employment with the District immediately.

You have the right to appeal this action to the Commissioner of Education for review by him, providing that you file notice of such appeal with this Board of Education with a copy mailed to the Commissioner within fifteen (15) days after you receive written notice of the action taken by the Board. Or, in the alternative, you may challenge this action by suit brought in the District Court of Harris County within thirty (30) days after you receive written notice of the action taken.

Yours very truly,

President, Board of Education

¹If a teacher is not terminated after a hearing, an appropriate letter should be prepared.

cc: Continuing Contract Teacher
Area (Assistant) Superintendent
Personnel Director
General Superintendent

bcc: School Board Attorney
Principal and Others

2KF3H

PREPARING THE WITNESS FOR A
TEACHER DISMISSAL HEARING OR TRIAL

There are certain matters of which prospective witnesses in teacher termination hearings should be advised in preparation for the hearing. Also, there are certain responsibilities that the administrators who made the recommendation for termination should undertake in preparation for the hearing. While the hearing before the Commissioner of Education and trial in court differ in some respects from the Board hearing, they are essentially the same. The points raised in this outline are, therefore, generally applicable to those hearings and trials also.

1. Prior to the hearing, the Administration should gather all documents which might be used in the hearing. These should be reviewed with the District's attorney to decide which will be used in the hearing. The documents must be legible so the Board members can read them with ease. Unintelligible documents or those which do not copy well should be redone or written over. When this is done, a notation should be made on the document that this has been done. After the documents to be used in the hearing have been identified, fifteen copies should be prepared and all copies of each exhibit kept together. Fifteen copies should provide a copy for each board member, the teacher's attorney, the court reporter and the Board's attorney with several extras for the file or press.
2. Whenever the documents which might be introduced at the hearing have been prepared, copies should be made available to the teacher and his or her attorney as soon as practical. Any document which might be used at a hearing should be given to the teacher's attorney. It is better to give the teacher's attorney more documents than might eventually be introduced to prevent limiting the Administration to the documents which will be introduced. In most cases, this should take place at least two weeks prior to the hearing.
3. The witnesses should assume that the board members know absolutely nothing about the case. It is the witness's responsibility to explain, in elementary terms, exactly what occurred in the school which led the administrator to recommend that the teacher be terminated. The

- witness must attempt to bring the classroom and the school into the hearing room so the Board will appreciate how the administrator observed the teacher.
4. The witnesses should not use any abbreviations because the Board may not be familiar with them. Further, the witnesses should avoid the use of educational jargon whenever possible, and every attempt should be made to utilize plain, understandable English.
 5. Witnesses should be deliberate in their testimony. A witness should not rush through the testimony, particularly with reference to the documentation. If necessary, the documents should be read or summarized for the Board. The Board does not know anything about the case, and it is the administrator's responsibility to establish a good cause for the termination of a continuing contract teacher or establish it is in the "best interests" of the District to terminate a probationary teacher.
 6. The witness should be familiar enough with the material and the document that he or she does not have to refer to the document excessively. In other words, the witness should be able to look the Board members in the eyes and testify concerning the documents. Eye contact and sincerity are most important.
 7. Witnesses should be straightforward in their testimony. The witnesses should tell it like it is even when it involves the use of profanity and other undesirable traits of the teacher. Recitation of uncomfortable incidents or the use of profanity might be conditioned by "Ladies and Gentlemen, I don't like to use this language, but I feel it is necessary to fully explain what occurred." The Board members must be convinced that there is a good reason for the termination of the teacher, and telling it like it actually occurred is the best approach.
 8. If the witnesses are asked whether they have met with the District's attorney, the Superintendent, or others to discuss the case, witnesses should readily admit they did meet. If pressed further by the teacher's attorney, the witness should indicate that it would not be good administrative practice not to meet to discuss the case and that it was necessary to meet prior to the

recommendation being made to the Superintendent and the Board and in preparing for the hearing. Witnesses should not be concerned about any innuendo by the teacher's attorney that it was improper to prepare the case. Everyone does it, and it is not only acceptable but essential to the adequate presentation of the case.

9. Witnesses should always tell the truth even when it appears to mitigate against the Administration's position. The reason for the hearing is to produce testimony to elicit what occurred, and the truth is the ultimate test.
10. If the case has a weakness or if there are obvious differences in the evaluations or differences in opinions between one Administrator or the other, the witness should acknowledge the differences and attempt to explain why these differences are present. It is much better for the Administration's witnesses to point out the weaknesses and explain why they are there rather than have the teacher's attorney point out these differences.
11. The witness should be advised that the rule might be invoked at the beginning of the hearing. The invoking of the rule means that all witnesses must leave the hearing room and come in and testify independently of each other. It also means that after each witness testified, he or she is not to talk with the other witnesses concerning the testimony until the hearing has been concluded. Even when the rule is invoked, the Administration's witnesses may talk about the testimony with the District's attorney. If a witness under the rule talks with another witness under the rule about the case, the Board could refuse to allow the witness to testify. The rule is invoked so the witnesses will not hear each other's testimony and will testify independently of each other. It is used by attorneys in an attempt to elicit contradictory testimony from the other party's witnesses. The teacher whose employment is being considered and a representative of the Administration are entitled to remain in the hearing at all times. A witness should not be surprised if the teacher's attorney asks if the witness has discussed the case with another witness.

12. A witness should not carry anything to the witness stand that he or she does not want the other attorney to read. Whenever one refers to a document or uses it to refresh his or her memory, the teacher's attorney is entitled to read the document. The teacher's attorney may also attempt to introduce the document into evidence.
13. Witnesses should be reminded that the Board determines who is telling the truth by observing the witness's demeanor on the stand and by judging the way the witness answers the questions put to him or her. There may be conflicting testimony over an event or document, and the Board will have to determine who is telling the truth. It is important for a witness to be direct and candid in his or her response to questions.
14. In hearings before the Board, have the witnesses testify without reading a prepared text unless it is impossible for them to testify otherwise. Notes should be used only to organize their thoughts, and it should not appear that they are depending upon the script in order to tell the truth. If an attorney asks the witness if he or she has made notes, the witness should answer "yes, to organize my thoughts for testimony." A witness should be prepared to tell the opposing attorney that it is necessary to have the notes in order to tell what he or she knows about the case.
15. Witnesses should speak up so that their testimony can be heard; otherwise, the message will not get across the Board. When a witness cannot be heard or understood, the testimony is wasted.
16. In direct or cross-examination, a witness should never suggest that there is other information available in answer to a question. For example, don't say "This is all the information I have here . . . I'd have to go through my other records." The attorney can ask for it and create questions in board members' minds or cause the hearing to be interrupted by having to produce the information. Another example which can lead to this type of questioning is "I don't remember . . . I'll have to look in my records."
17. A witness being cross-examined should answer the question directly with a "yes," "no," or "I do not

remember." If it is necessary to explain an answer, that should be done after the answer has been given. Sometimes it will be necessary to give an answer such as "I can not answer that question yes or no -- let me explain." When a witness does not answer a question directly or make an attempt to do so, the Board members will begin to question the witness' veracity. Furthermore, long and entwined answers take time, and the Board members get bored.

Script for Hearing for Termination Hearing
Kelly Frels, Bracewell & Patterson

HEARING OF _____

BOARD PRESIDENT: The purpose of this meeting is to consider the employment status of Euell B. Fired. We have set the meeting for this afternoon, November 16, 1983.

Mr. Superintendent, what are the circumstances which have brought us here today?

SUPERINTENDENT: Mr. President, Members of the Board, on November 1, 1983, the administration recommended to the Board that Mr. Euell B. Fired be terminated. Mr. Fired was notified by letter from the superintendent on November 2, 1983, that such recommendation was presented to the Board and the reasons for the proposal. After being advised of the proposal by letter, Mr. Fired requested a hearing before the Board. On November 8, 1983, letters were hand delivered to Mr. Fired advising him of the names of the administration's witnesses and the nature of their testimony which will be presented at this hearing. He was also informed of the documents to be used. On November 12, 1983, his attorney was provided several additional documents.

BOARD PRESIDENT: This hearing will be conducted as an administrative hearing and no strict rules of evidence will apply. However, the parties will be held to testimony that is relevant and the chair will entertain any pertinent evidence objectives concerning hearsay or other matters. Mr. Fired is represented by Mr. Abel Shyster. The administration is represented by Ms. Willa Gettem, attorney for the _____ Independent School District. Mr. Shyster, you have the right to present witnesses, documentary evidence and make oral arguments. You are also permitted to cross-examine the witnesses offered by the district's administration. In addition, the administration may cross-examine the witnesses you present. The members of the Board may question either counsel or the witnesses at anytime. However, the members of the Board are not subject to questioning by either counsel or the witnesses.

In order to make a most accurate record possible of this hearing, it is being recorded by a tape recorder (or reported by a court reporter). Please avoid talking when others are speaking. For the record, Mr. Fired and his representative, Mr. Shyster, are present. The following board members are present: _____

The following members of the administration are present: _____

Pursuant to Mr. Fired's request, this hearing will be a closed hearing. The hearing will be conducted basically as follows: I will read the reasons which support the action to terminate Mr. Fired's employment. Ms. Gettem may present witnesses and their testimony and any documentary evidence that the administration wishes. After they have concluded their presentation, Mr. Shyster may present any witnesses and documentary evidence to refute or disprove the grounds of the action or evidence offered by the school's witnesses.

At the conclusion of Mr. Fired's case, rebuttal testimony may be offered by the administration. Ms. Gettem may then make concluding arguments following which Mr. Shyster may make concluding arguments to the Board.

_____ will swear all witnesses and will receive and mark all exhibits and documentary evidence. To facilitate the offering of materials for evidence, please hand _____ a copy and allow sufficient time for her to mark it before proceeding. Are there any questions regarding the manner in which this administrative hearing will be conducted?

In hearing the evidence and making a determination at the conclusion of this hearing, each member of the board must be a fair and impartial judge of the matters presented. I will now poll each board member present to determine if he or she can consider the evidence and enter a fair and impartial decision based only upon the evidence you hear in this proceeding.

As indicated in the letter of November 2, 1983, the action to terminate employment is based upon _____
(reasons)

We will now swear all witnesses. Would either party like to invoke the rule?

If rule is invoked: Ladies and gentlemen, the rule has been invoked. This means that all witnesses - other than the one testifying - will be excluded from the room. Mr. Fired may, of course, remain in the room. The administration may designate a representative. Ms. Gettem? For those of you who are going to be witnesses, it is important to know that you are not to talk to each other or anyone else about the case or your testimony except that you may talk to Ms. Gettem or Mr. Shyster about the case or your testimony.

Ms. Gettem, you may proceed.

(The Administration presents its case)

BOARD PRESIDENT: Mr. Shyster, you may present your case.

(The employee presents his case).

BOARD PRESIDENT: Ms. Gettem, do you have any rebuttal?

BOARD PRESIDENT: Mr. Shyster, do you have anything further?

BOARD PRESIDENT: Ms. Gettem, you may make a closing statement.

BOARD PRESIDENT: Mr. Shyster, you may make a closing statement.

BOARD PRESIDENT: Now that we have heard the evidence, it is time to deliberate and make a decision. If the Board feels that the preponderance of the evidence supports the reasons for termination, it may vote to terminate Mr. Fired's employment. In making this determination, each Board member is reminded that "preponderance of the evidence" means that more evidence supports the reasons for termination than does not. If the Board

finds that there is not a preponderance of evidence supporting the reasons for termination, it should vote not to terminate Mr. Fired's employment.

Mr. Shyster, the Board would like to deliberate alone. Do you have any objection to that? If you do, please say so and we will abide by your request. Any vote, of course, must be taken in open session. Does either side wish to present any proposed motions to the Board?

(Board deliberates)

OPEN SESSION

BOARD PRESIDENT: Do I have a motion?

(Board President then states the result of the vote).

ADJOURNMENT

31TTCSM

STATEMENT OF PRESIDING OFFICER AND ORDER OF
BUSINESS FOR TEACHER TERMINATION HEARINGS BEFORE THE
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF OMAHA

1. Call meeting to order.
2. Identify and introduce all board members.
3. Roll call.

READ 4. "This hearing before the Board of Education of the School District of Omaha on the termination of a permanent teacher's contract is being held at the request of (Teacher's name)."

READ 5. "This hearing will be conducted in accordance with the Nebraska Tenure Statutes. If (Mr., Mrs., Miss or Ms.) (Teacher's name) requests, this hearing may be held in closed session." "Do you wish to have this hearing held in a public session or in a closed session."

(NOT TO BE READ: If a closed session is requested by the teacher, a motion should be made for the Board to go into executive session. The purpose for going into executive session, the vote, and the time of entry to and exit from executive session should be noted for purposes of the record.)

READ 6. "This hearing will proceed as follows:

- a. First, the Superintendent or his representative will be given an opportunity to make an opening statement."

- b. "Second, (Teacher's name) or (his or her) representative will be given an opportunity to make an opening statement."
- c. "Third, the Superintendent or his representative will present evidence concerning the decision to recommend termination of (Teacher's name) contract. If the evidence is by live testimony, the Superintendent or his representative will first question the witness. After this questioning is completed, the Teacher or (his or her) representative may question the witness. When questioning is completed by the Superintendent and the Teacher, the Board members may question the witness. If the questions asked by Board members occasion any additional questions which the teacher or Superintendent wishes to ask, either may ask additional questions."
- d. "Fourth, (Teacher's name) or (his or her) representative will be given an opportunity to put on evidence. The questioning of any witnesses called by the Teacher shall be completed in the same manner as that followed for the Superintendent's witnesses."
- e. "Fifth, the Superintendent or his representative will be given an opportunity to present any rebuttal evidence. Questioning of any witnesses

called in rebuttal shall be completed in the same manner as that followed above."

- f. "Sixth, after completion of the presentation of all evidence, the Superintendent will be given an opportunity to make a closing statement to the Board of Education."
- g. "Seventh, after completion of the Superintendent's closing statement, the teacher will be given an opportunity to make a closing statement also."
- h. "Eighth, following completion of the closing statements, the Board members will deliberate in executive session concerning their decision on the Superintendent's recommendation."
- i. "Ninth, after deliberation in executive session, the Board members will return to public session and vote on their decision."
- j. "Tenth, the teacher and (his or her) representative will be notified in writing of the Board's findings and determinations."
- k. "Eleventh, the hearing will not be conducted according to the strict rules of law relating to the examination of witnesses or the presentation of evidence. Any relevant evidence will be admitted by the presiding officer if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."

- READ 7. "Are there any questions before this hearing begins? Are there any procedural matters which need to be taken care of at this time?" [If response is affirmative, call upon party so responding to address the issue first and then upon the opposing party.]
- DO NOT 8. Call upon the Superintendent or his representative and then
READ on the teacher or his or her representative to offer an opening statement.
9. Call upon the Superintendent or his representative to introduce any exhibits and to call any witnesses which support his recommendation.
- a. Administer the following oath to witnesses:
- READ "Do you solemnly swear or affirm that you will tell the truth, the whole truth, and nothing but the truth in this hearing?" (Response: "I do.")
- DO NOT b. Allow the Superintendent or his representative to
READ question the witness.
- c. Allow the teacher or teacher's representative to question the witness.
- d. Allow Superintendent or his representative to ask any additional questions caused by the teacher's questions.
- e. Allow the teacher or his or her representative to ask any questions caused by Superintendent's most recent questions.

- f. Allow Board members to question the witness.
 - g. If Board members have quesitoned the witness, then allow the Superintendent or his representative to ask any questions he may have based on the Board members' questions.
 - h. If Board members have questioned the witness, then allow the teacher or teacher's representative to ask the witness any questions he or she may have based on the Board members' questions.
 - i. Ascertain whether the Superintendent has any further witnesses or exhibits.
10. Call upon the teacher or his or her representative to introduce any exhibits and to call any witnesses in support of the teacher.
- a. Administer the following oath to witnesses:
"Do you solemnly (swear or affirm) that you will tell the truth, the whole truth, and nothing but the truth in this hearing?" (Response: "I do.")
 - b. Allow the teacher or teacher's representative to question the witness.
 - c. Allow the Superintendent or his representative to question the witness.
 - d. Allow the teacher or his or her representative to ask any additional questions caused by the Superintendent's questions.

READ

DO NOT

READ

- e. Allow the Superintendent or his or her representative to ask questions caused by the teacher's most recent questions.
- f. Allow Board members to question the witness.
- g. If Board members have questioned the witness, then allow the teacher or teacher's representative to ask the witness any questions he or she may have based on the Board members' questions.
- h. If Board members have questioned the witness, then allow the Superintendent or his representative to ask any questions he may have based on the Board members' questions.
- i. Ascertain whether the teacher has any further witnesses or exhibits.

11. Allow the Superintendent or his representative to make a closing statement.

12. Allow the teacher or teacher's representative to make a closing statement.

READ 13. "We will close the hearing at this time. The Board members will deliberate privately on the Superintendent's recommendation, make a public decision on the recommendation and inform all parties in writing of their decision."

DO NOT READ - INSTRUCTIONS TO CHAIR

- If the Board of Education is not already in executive session pursuant to the request of the teacher, a motion should be made to go into executive session to deliberate concerning the Superintendent's recommendation. The

purpose for going into executive session and the time of entry and exit from executive session should be noted for purposes of the record.

- The decision of the Board members must be based on the statements and evidence presented to it at the hearing.
- After deliberation is completed, the Board members should reconvene in public session to vote on their decision.

14. Roll call.

15. Motion and vote.

STATEMENT OF PRESIDING OFFICER AND ORDER OF
BUSINESS FOR TEACHER NONRENEWAL HEARINGS BEFORE THE
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF OMAHA

1. Call meeting to order.
2. Identify and introduce all those present.
3. Roll call. (Quorum = 3 Board members)

READ 4. "This hearing before the Board of Education of the School District of Omaha on the nonrenewal of a probationary teacher's contract is being held at the request of _____

READ (Teacher's name)."

5. "This hearing will be conducted in accordance with the Tenure Statutes which permit this hearing to be held before at least three board members. The Board members here today will hear all the evidence presented and make a recommendation to the full Board, which will act on this recommendation at its meeting on (specify date). If (Mr., Mrs., Miss or Ms.) (Teacher's name) requests, this hearing may be held in closed session."

"Do you wish to have this hearing held in a public session or in a closed session?"

(NOT TO BE READ: If a closed session is requested by the teacher, a motion should be made for the Board to go into executive session. The purpose for going into executive session, the vote, and the time of entry to and exit from

Note: Under Nebraska law, the employment contract of a probationary teacher is severed by nonrenewal proceedings and the teaching contract of a permanent teacher is severed by termination proceedings.

executive session should be noted for purposes of the record.)

READ 6. "This hearing is being held to give (Teacher's name) an opportunity to discuss and explain to the school board (his or her) position with regard to continued employment, to present information on that issue, and to ask questions of those persons appearing on behalf of the Superintendent.

READ

7. "This hearing will proceed as follows:"

- a. First, the Superintendent or his representative will be given an opportunity to make an opening statement and to present evidence concerning the decision not to renew (Teacher's name)'s contract provided the evidence is relevant and not unduly repetitive. If the evidence is by live testimony, the Superintendent or his representative will first question the witness. After this questioning is completed, the Teacher or (his or her) representative may question the witness. When questioning is completed by the Superintendent and the Teacher, the Board members may question the witness. If the questions asked by Board members occasion any additional questions which the teacher or Superintendent wishes to ask, either may ask additional questions.
- b. "Next, (Teacher's name) or (his or her) representative will be given an opportunity to make an opening statement and to put on any evidence (he or

she) desires, provided it is relevant and not unduly repetitive. The questioning of any witnesses called by the Teacher shall be completed in the same manner as that followed for the Superintendent's witnesses."

- c. "After completion of the Teacher's evidence, the Superintendent will be given an opportunity to make a closing statement to the Board of Education."
- d. "After completion of the Superintendent's closing statement, the teacher will be given an opportunity to make a closing statement also."
- e. "Following completion of the closing statements, the Board members present will deliberate in executive session concerning the proper recommendation to the full Board on the nonrenewal of (Teacher's name) contract."
- f. "After deliberation in executive session, the Board members present will return to public session and vote on the appropriate recommendation."
- g. The teacher and (his or her) representative will be notified immediately of the recommendation to the full Board.
- h. "It should also be noted that this is an informal hearing. The rules of evidence will not apply here."

- NOT 8. Call upon the Superintendent or his representative to offer
READ an opening statement.
9. Call upon the Superintendent or his representative to
introduce any exhibits and to call any witnesses which
support his decision.
- a. Ascertain the source of any exhibits offered.
 - b. Administer the following oath to witnesses:
"Do you solemnly swear or affirm that you will tell
the truth, the whole truth, and nothing but the
truth in this hearing?" (Response "I do.")
 - c. Allow the Superintendent or his representative to
question the witness.
 - READ d. Allow the teacher or teacher's representative to
question the witness.
 - e. Allow Board members to question the witness.
 - f. If Board members have questioned the witness, then
allow the Superintendent or his representative to
ask any questions he may have based on the Board
members' questions.
 - g. If Board members have questioned the witness, then
allow the teacher or teacher's representative to ask
the witness any questions he or she may have based
on the Board members' questions.
 - h. Ascertain whether the Superintendent has any further
witnesses or exhibits.

10. Call upon the teacher or his or her representative to introduce any exhibits and to call any witnesses in support of the teacher.

- a. Ascertain the source of any exhibits offered.
- b. If the teacher does not have a representative and wishes to make a statement on his or her own behalf, ask the teacher if he or she wishes to speak under oath, and administer the oath set forth below if the answer is yes.

c. Administer the following oath to witnesses:

READ

"Do you solemnly (swear or affirm) that you will tell the truth, the whole truth, and nothing but the truth in this hearing?" (Response: "I do.")

- d. Allow the teacher or teacher's representative to question the witness.
- e. Allow the Superintendent or his representative to question the witness.
- f. Allow Board members to question the witness.
- g. If Board members have questioned the witness, then allow the teacher or teacher's representative to ask the witness any questions he or she may have based on the Board members' questions.
- h. If Board members have questioned the witness, then allow the Superintendent or his representative to ask any questions he may have based on the Board members' questions.

- i. Ascertain whether the teacher has any further witnesses or exhibits.

11. Allow the Superintendent or his representative to make a closing statement.

12. Allow the teacher or teacher's representative to make a closing statement.

READ 13. "We will close the hearing at this time. The Board members present will deliberate privately on an appropriate recommendation to the full Board, make a public decision on the recommendation and immediately inform all parties of their recommendation."

DO NOT READ INSTRUCTIONS TO CHAIR

- If the Board of Education is not already in executive session pursuant to the request of the teacher, a motion should be made to go into executive session to deliberate concerning the appropriate recommendation. The purpose for going into executive session and the time of entry and exit from executive session should be noted for purposes of the record.
- The decision of the Board members must be based on the statements and evidence presented to it at the hearing.
- After deliberation is completed, the Board members should reconvene in public session to vote on the recommendation to the full Board.

14. Roll call.

15. Motion and vote.

STATEMENT OF PRESIDING OFFICER AND ORDER OF
BUSINESS FOR GRIEVANCE HEARINGS BEFORE THE BOARD
OF EDUCATION OF THE SCHOOL DISTRICT OF OMAHA

1. Call meeting to order.
2. Identify and introduce all those present.
3. Roll call.

READ 4. "This grievance hearing before the Board of Education of the School District of Omaha is being held at the request of _____
(Grievant's name)."

READ 5. "This grievance hearing will be conducted in accordance with the Public Meetings Act. If (Mr., Mrs., Miss or Ms.)
(Grievant's name) feels that any of the testimony or evidence to be introduced in this hearing will cause needless injury to (his or her) reputation, this hearing may be held in closed session."

"Do you wish to have this hearing held in a public session or in a closed session?"

(NOT TO BE READ: If a closed session is requested by the grievant, a motion should be made for the Board to go into executive session in order to prevent needless injury to the reputation of the grievant. The purpose for going into executive session, the vote, and the time of entry to and exit from executive session should be noted for purposes of the record.)

Note: Under Nebraska law, the employment contract of a probationary teacher is severed by nonrenewal proceedings and the teaching contract of a permanent teacher is severed by termination proceedings.

READ 6. "This grievance hearing is being held to give (Grievant's name) an opportunity to tell the Board members why (he or she) thinks the decision of the Superintendent on the grievance is incorrect."

READ 7. "This grievance hearing will proceed as follows:"

- a. "First, (Grievant's name) or (his or her) representative will be given an opportunity to make an opening statement concerning this grievance."
- b. "Next (Grievant's name) will be given an opportunity to put on any evidence (he or she) desires, provided it is relevant to this grievance proceeding and not unduly repetitive. If the evidence is by live testimony, (Grievant's name) or (his or her) representative will first question the witness. After this questioning is completed, the Superintendent or the Superintendent's representative may question the witness. If the questions asked by Board members occasion any additional questions which the grievant or Superintendent wishes to ask, either may ask additional questions."
- c. After the grievant has completed the introduction of all of (his or her) evidence, the Superintendent or Superintendent's representative will be given an opportunity to make an opening statement and to present evidence concerning the grievance provided the evidence is relevant to the grievance and not unduly repetitive. The questioning of any witnesses

called by the Superintendent shall be completed in the same manner as that followed for (Grievant's name)'s witnesses."

- d. "After completion of the Superintendent's evidence, (Grievant's name) or (his or her) representative will be given an opportunity to make a closing statement to the Board of Education."
- e. "After completion of (Grievant's name)'s closing statement, the Superintendent or his representative will be given an opportunity to make a closing statement also."
- f. "Following completion of the closing statements, the Board of Education will deliberate in executive session concerning the proper resolution of this grievance."
- g. "After deliberation in executive session, the Board of Education will return to public session and vote on the resolution of this grievance."
- h. "Pursuant to Policy 3.31a4, the Board of Education will give written notice to (Grievant's name) and the Omaha Education Association of its decision within fifteen working days of the date of today's hearing."
- i. "It should also be noted that this is an informal hearing. The rules of evidence will not apply here."

○ NOT
READ

8. Call upon the grievant or grievant's representative to offer an opening statement.

9. Allow the grievant or grievant's representative to introduce any exhibits and to call any witnesses in support of the grievance.

a. Ascertain the source of any exhibits offered.

b. If the grievant does not have a representative and wishes to make a statement on his or her own behalf, ask the grievant if he or she wishes to speak under oath, and administer the oath set forth below if the answer is yes.

c. Administer the following oath to witnesses:

READ

"Do you solemnly (swear or affirm) that you will tell the truth, the whole truth, and nothing but the truth in this hearing?" (Response: "I do.")

d. Allow the grievant or grievant's representative to question the witness.

e. Allow the Superintendent or Superintendent's representative to question the witness.

f. Allow Board members to question the witness.

g. If Board members have questioned the witness, then allow the grievant or grievant's representative to ask the witness any questions he or she may have based on the Board members' questions.

h. If Board members have questioned the witness, then allow the Superintendent or Superintendent's

representative to ask any questions he or she may have based on the Board members' questions.

- i. Ascertain whether the grievant has any further witnesses or exhibits.

10. Call upon the Superintendent or Superintendent's representative to introduce any exhibits and to call any witnesses which support his decision.

- a. Ascertain the source of any exhibits offered.

- b. Administer the following oath to witnesses:

READ

"Do you solemnly swear or affirm that you will tell the truth, the whole truth, and nothing but the truth in this hearing?" (Response "I do.")

- c. Allow the Superintendent or Superintendent's representative to question the witness.

- d. Allow the grievant or grievant's representative to question the witness.

- e. Allow Board members to question the witness.

- f. If Board members have questioned the witness, then allow the Superintendent or Superintendent's representative to ask any questions he or she may have based on the Board members' questions.

- g. If Board members have questioned the witness, then allow the grievant or grievant's representative to ask the witness any questions he or she may have based on the Board members' questions.

- h. Ascertain whether the Superintendent has any further witnesses or exhibits.

12. Allow the grievant or grievant's representative to make a closing statement.

13. Allow the Superintendent or Superintendent's representative to make a closing statement.

READ 14. "We will close the grievance hearing at this time. The Board of Education will deliberate privately and inform all parties of its decision in writing within fifteen working days."

DO NOT READ INSTRUCTIONS TO CHAIR

- If the Board of Education is not already in executive session pursuant to the request of the grievant, a motion should be made to go into executive session to deliberate concerning the grievance. The purpose for going into executive session and the time of entry and exit from executive session should be noted for purposes of the record.
- The decision of the Board must be based on the statements and evidence presented to it at the grievance hearing.
- After deliberation is completed, the Board should reconvene in public session to vote on the resolution of the grievance.

15. Roll call.

16. Motion and vote.

PROCEDURE FOR HEARING OF GRIEVANCE

(OPEN SESSION)

BOARD PRESIDENT:

Purpose of the Meeting: The purpose of this meeting is to consider the grievance of [REDACTED] the Principal at [REDACTED] Senior High School. Mrs. [REDACTED] has processed her grievance through the administrative process alleging violation of [REDACTED] Policy and Procedure 581.000 and [REDACTED] Procedure 581.220, and the Operational Handbook - Principal Quality Assurance Program, February 1983. Mrs. [REDACTED] filed her grievance on July 5, 1983, and the grievance was denied at Step III on October 10, 1983. Mrs. [REDACTED] has referred her appeal to the next step which is the Board of Education. Any action by the Board as a result of this hearing will be taken in open session.

The Board's objective is to hear from the grievant how she feels these policies or procedures of the Board of Education have been violated. After hearing the administration explain their interpretation of the policies and procedures, it will be the Board's responsibility to determine whether the policy or procedure has been clearly applied to the grievant. The Board has final authority and responsibility to determine what the policy and procedure of the Board means and how that policy and procedure should be applied.

In order to provide the most accurate record possible of this hearing, a tape recording of the proceedings is being made. Please avoid talking when others are speaking so the tape will adequately reflect the proceedings. For the record, Mrs. [REDACTED] and her representative, Ms. [REDACTED] are present. The following Board members are present: _____

Outline of the Procedure to be Followed: This hearing will be conducted as an appellate hearing. The hearing before this Board shall be based on the transcript of the hearing at Level III and no new evidence shall be submitted. Each side shall be entitled to make oral argument based on the transcript. Ms. [REDACTED] is urging this grievance and will therefore have the burden of proving her facts to be true and convincing us that her interpretation of the applicable policy is correct. Ms. [REDACTED] you will be allowed to make a fifteen minute presentation to the Board followed by a fifteen minute presentation by Mr. [REDACTED], representing the administration. Both sides shall be available for questions from the Board after their presentation. After deliberation, the Board will then render its decision.

Copies of the transcript of the hearing at Level III have been furnished to members of the Board in sufficient time for their consideration and study.

Are there any questions regarding the manner in which this administrative appellate hearing will be conducted?

A-265

Issues for Determination: [REDACTED] Policies and Procedures 581.000 deals with Administrators Assistance and Assessment while Procedure 581.220 deals with the Building Administrators. Operational Handbooks approved by the Board carry the force of Board Policy and Procedure. Were these policies, procedures, and handbook clearly applied to the grievant?

Ms. [REDACTED], you may make your presentation to the Board based on the transcript. (FIFTEEN MINUTES OR LESS)

Mr. [REDACTED], you may make your presentation to the Board based on the transcript. (FIFTEEN MINUTES OR LESS)

Are there any questions from the Board members?

Instructions Before Deliberation: The parties have completed their presentations, and it is now time for us to make our decision on the issues before us. In the issues where there is a question of fact, i.e., of what happened, we must determine what happened from the evidence presented here. We must then apply the facts we find to be true to the applicable policy or law and make a decision. If there is any dispute between the grievant and the administration as to what the policies or procedures mean then it is the Board's responsibility to determine the meaning or application of the policies and procedures. Any action we take must be supported by substantial evidence. That is, if the evidence supports the position of Ms. [REDACTED] or the position of the District, we may find accordingly. Is there any discussion? (Discussion and questions among the Board members)

Do I have a motion? (A motion stating a finding of certain facts and an application to the issues in dispute should be made at this time.)

Vote on the motion, after discussion, if necessary.

Advising the Parties of the Results: (Inform the parties what the Board decided in sufficient detail that they understand.)

Conclusion of the Hearing: A letter notifying the grievant of the action of the Board shall be prepared and signed by the President of the Board within the shortest period of time practical in the circumstances. This hearing is concluded.

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HEARING BEFORE THE
BOARD OF EDUCATION

THE MATTER OF

ADMINISTRATION BUILDING
3830 RICHMOND AVENUE

MAY 19, 1986

ADMINISTRATION'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS

TO THE BOARD OF EDUCATION:

COMES NOW the Administration of the [REDACTED] School District and files this its Proposed Findings of Fact and Conclusions in connection with the proposed termination of [REDACTED]. The following findings of fact and conclusions are based on the evidence heard and exhibits admitted into evidence during the hearing before the Board of Education on May 19, 1986.

I. PROPOSED FINDINGS OF FACT

A. PROCEDURAL ASPECTS

1. On August 17, 1985, the General Superintendent submitted a proposal to the Board that Mr. [REDACTED] employment with the District as an administrator be terminated immediately. The Board instructed the General Superintendent to notify Mr. [REDACTED] that the proposal to terminate is pending before the Board.

2. After being advised of the Board's action by letter dated August 21, 1985, Mr. [REDACTED] requested a hearing with the Board of Education. By letter dated April 28, 1986, Mr. [REDACTED] was notified that a hearing before the Board of Education would be granted. A letter dated October 7, 1985 notified Mr. [REDACTED] of the procedure which would be followed at the hearing, the reasons given for the proposed termination, the names of witnesses and the nature of their testimony which would be presented at the hearing.

3. A hearing was conducted before the Board of Education on May 19, 1986. The members of the Board who

were present were _____

The hearing was conducted pursuant to Board policy, and procedure 593.140 which provides that an administrator who receives notice of intent to terminate shall be entitled, at the option of the administrator, to have a hearing before the Board of Education regarding the recommended action.

4. No members of the Board had had any prior personal contact with Mr. [REDACTED] so that the members felt they could not be fair and impartial in listening to the evidence presented to them.

5. After a full hearing, by a _____ vote, it was decided that the recommendation of the General Superintendent be sustained and that Mr. [REDACTED] be terminated under School Board Policy Section 511.100 and Section 5(d) of his administrator contract. Section 5(d) of Mr. [REDACTED] administrator contract provides that the District may discharge an employee and terminate salaried payments for repeated failure to comply with official directives and established School Board Policy. Board Policy 511.100 provides that "any falsification of either information or credentials on the application for employment shall be cause for dismissal."

6. At the hearing Mr. [REDACTED] was represented by Dr. [REDACTED], Executive Director of the [REDACTED] Association of School Administrators.

B. SUBSTANTIVE ASPECTS

1. Mr. [REDACTED] falsified information concerning his employment history and embezzlement conviction on his application for employment with the District dated January 28, 1972.

2. Mr. [REDACTED] falsified information concerning his employment history and embezzlement conviction on his

application for employment with the District dated August 1, 1975.

3. Mr. [REDACTED] falsified information concerning his employment history on his supplemental application for employment with the District dated October 3, 1975.

II. PROPOSED CONCLUSIONS

1. The District has afforded Mr. [REDACTED] all his contractual and constitutional rights to substantive and procedural due process as an administrator with this District.

2. The [REDACTED] has provided Mr. [REDACTED] with a fair and impartial hearing regarding his proposed termination with the District.

3. Mr. [REDACTED] violated Section 5(d) of his administrator contract inasmuch as he has repeatedly failed to comply with established School Board Policy.

4. Mr. [REDACTED] actions constitute a violation of School Board Policy Section 511.100 in that he knowingly falsified information and credentials on his applications for employment. Such falsification is cause for dismissal.

III. RECOMMENDED DECISION

1. The Administration recommends that the foregoing Proposed Findings of Fact and Conclusions be adopted by the Board of Education as the Findings of Fact and Conclusions of the Board of Education of the [REDACTED] School District.

2. Based on the foregoing proposed Findings of Fact and Conclusions, the Administration of the [REDACTED] School District recommends that Mr. [REDACTED] employment with the District be terminated pursuant to Section 5(d) of his administrator contract and Section 511.100 of the School Board Policies for falsification of the application of employment and repeated failure to comply with established School Board Policies.

3. Based upon the foregoing recommendations, the Administration recommends that the Board, by a motion duly made and seconded, and, by a majority vote of those present here today, terminate Mr. [REDACTED] employment immediately.

Respectfully submitted,

Bracewell & Patterson

By:

Kelly Frels
State Bar No. 07438000
Stephen L. Braun
State Bar No. 02918800

2900 South Tower [REDACTED]
[REDACTED]
[REDACTED]

Attorney for the [REDACTED]
[REDACTED] School District

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IN RE

§ ADMINISTRATOR HEARING
§ COMMITTEE

THE MATTER OF

§ [REDACTED] ADMINISTRATION BUILDING
§ 3830 RICHMOND AVENUE

§ [REDACTED]
§ OCTOBER 29, 1985

ADMINISTRATION'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS

TO THE ADMINISTRATOR HEARING COMMITTEE:

COMES NOW the Administration of the [REDACTED] School District and files this its Proposed Findings of Fact and Conclusions in connection with the proposed termination of [REDACTED]. The following Findings of Fact and Conclusions are based on the evidence presented to the Administrator Hearing Committee convened on October 29, 1985.

I. PROPOSED FINDINGS OF FACT

A. PROCEDURAL ASPECTS

1. On July 11, 1985, the General Superintendent submitted a proposal to the Board that Mr. [REDACTED] employment with the District as an administrator be terminated immediately. The Board instructed the General Superintendent to notify Mr. [REDACTED] that the proposal to terminate is pending before the Board.

2. On April 28, 1977, the Board of Education adopted policy and procedure 593.140 which provides that an administrator who receives notice of intent to terminate shall be entitled to have a hearing before an Administrative Hearing Committee prior to the hearing of the matter before the Board.

3. After being advised of the Board's action by letter dated August 21, 1985, Mr. [REDACTED] requested a hearing with the Administrator Hearing Committee. By letter dated October 22, 1985 to Mr. [REDACTED] attorney, Mr. [REDACTED] was notified that a hearing before the Administrator Hearing

Committee had been set for October 29, 1985. This letter further notified Mr. [REDACTED] of the procedure which would be followed at the hearing, the reasons given for the proposed termination, the names of witnesses and the nature of their testimony which would be presented at the hearing.

4. This hearing was conducted before the Administrator Hearing Committee on October 29, 1985. The Administrator Hearing Committee was composed of _____

B. SUBSTANTIVE ASPECTS

1. Mr. [REDACTED] falsified information on his application for employment with the District dated June 15, 1977.

2. On March 12, 1985, Mr. [REDACTED] made an untrue statement when he stated that he needed to use some compensatory time during the middle of the day to conduct personal business at the Houston Community College.

3. On March 12, 1985, during the middle of the day, Mr. [REDACTED] went to the [REDACTED] Warehouse and without authority from [REDACTED], offered [REDACTED] computer paper for sale to a vendor.

4. Mr. [REDACTED] contracted for warehouse space at Solon Avenue to store [REDACTED] computer paper without authority from [REDACTED] and instructed the vendor to sell the [REDACTED] computer paper from that warehouse in lieu of rent for the warehouse space.

5. Mr. [REDACTED] falsified the receiving report dated February 20, 1985, regarding the computer paper stored at the [REDACTED] Warehouse.

6. Mr. [REDACTED] used [REDACTED] stationary supplies to take care of his personal business including his personal bills to [REDACTED] Child Support and [REDACTED] Mortgage Company.

7. On November 30, 1984, Mr. [REDACTED] ordered computer manuals from [REDACTED] Corporation without authority from [REDACTED]. for computers not owned, or leased by the Data Processing Department.

8. On Information and belief, Mr. [REDACTED] ordered and received a [REDACTED] microcomputer with 256 KB additional memory, one [REDACTED] printer and seven associated manuals/software. These items were ordered and received by Mr. [REDACTED] without authorization from [REDACTED] and in violation of District policy. By letter dated August 19, 1985, Mr. [REDACTED] was instructed to return these items to [REDACTED] Assistant Superintendent.

9. On June 6, 1985, Mr. [REDACTED] refused to complete the sworn statement as instructed by [REDACTED] Assistant Superintendent.

10. On June 11, 1985, and on June 21, 1985, Mr. [REDACTED] again refused to complete the sworn statement as instructed by [REDACTED], Deputy Superintendent.

11. On or about January 1984, October 8, 1984, October 17, 1984, November 30, 1984, and March 12, 1985, Mr. [REDACTED] failed to follow internal Data Processing budget procedures.

12. On or about December 6, 1984, and February 4, 1985, Mr. [REDACTED] instructed vendors to ship items not in compliance with bid specifications and not detailed on the purchase orders.

13. On or about December 6, 1984, and February 4, 1985, Mr. [REDACTED] instructed vendors to bill the District for items listed on the purchase orders which were not delivered to the District. Section 5(f) provides that an employee may be terminated for "repeated and continued neglect of duty." This proposed action is based on the charges listed below:

14. Mr. [REDACTED] failed to provide accurate information regarding contracting for unneeded additional warehouse space.
15. Mr. [REDACTED] failed to provide complete and accurate information to the Purchasing Department regarding warehouse bid vendors.
16. Mr. [REDACTED] continually failed to comply with internal Data Processing budget procedures.
17. Mr. [REDACTED] recommended the bid and purchase of quantities of stock paper which were not needed by the Data Processing Department.
18. Mr. [REDACTED] failed to advise the District that he had been convicted on June 14, 1977, of a felony or other crime involving moral turpitude on his application for employment dated June 15, 1977.

II. PROPOSED CONCLUSIONS

1. The District has afforded Mr. [REDACTED] all his contractual and constitutional rights to procedural due process as an administrator with this District.
2. The District has afforded Mr. [REDACTED] all his contractual and constitutional rights to substantive due process as an administrator with this District.
3. Mr. [REDACTED] violated Sections 5(a), 5(d), 5(f), and 5(m) of his administrator contract inasmuch as he has carried out acts constituting immorality, failure to follow official directives, repeated and continued neglect of duty, and good cause for termination as determined by the District. He has also violated Board Policy Section 511.100 inasmuch as he has falsified information on his employment application.
4. Mr. [REDACTED]'s actions constitute good cause for termination in that he failed to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts throughout the State [REDACTED]

III. RECOMMENDED DECISION

1. The Administration recommends that the foregoing Proposed Findings of Fact and Conclusions be adopted by the Administrator Hearing Committee as the Findings of Fact and Conclusions of the Administrator Hearing Committee.

2. Based on the foregoing proposed Findings of Fact and Conclusions, the Administration recommends that the Administrator Hearing Committee recommend to the Board of Education that Mr. [REDACTED] employment with the District be terminated pursuant to Section 5(a), 5(d), 5(f) and 5(m) of his administrator contract and Board Policy Section 511.100.

Respectfully submitted,
Bracewell & Patterson

By: _____
Kelly Frels
TBA No. 07438000

2900 South Tower [REDACTED]
[REDACTED]
[REDACTED]

Attorney for the [REDACTED]
[REDACTED] School District

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THE ADMINISTRATIVE PROCESS:
TEACHER TERMINATION AND NONRENEWAL HEARINGS
BEFORE A BOARD OF EDUCATION

David M. Pedersen
BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & STRASHEIM
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(402) 344-0500

I. Rationale For The Use of The Administrative Process.

A. Cost saving.

1. Money.
2. Time.

B. Democratic control.

1. Elected boards decide.
2. Not appointed judges.

C. Conclusion: keep the process administrative.

II. The Process Must Conform To Constitutional Due Process Requirements.

A. The fundamentals of due process:

1. Notice of the charges against the individual.
2. An opportunity for a meaningful hearing at a meaningful time on the charges of which the individual has received notice.

B. The eight basic elements of due process.

1. Notice of the charges in sufficient detail to enable the employee to present evidence relating to them.
2. Notice of the time and place of the hearing sufficiently in advance to have time to prepare.
3. Notice of the names of those who have made the allegations against the employee and the nature of their testimony.
4. A hearing before an impartial hearing officer or officers.
5. The opportunity to be represented by counsel.
6. The opportunity to present the employee's side of the story either by the employee's own testimony and/or the testimony of others.
7. The opportunity to confront and cross examine the witnesses against the employee.

8. A written decision stating the reasons for the decision.

III. The Process Should Also Be Adjudicative.

- A. University of Tennessee v. Elliott, ___ U.S. ___, 54 U.S.L.W. 5084 (July 7, 1986).

1. In this case the United States Supreme Court held regarding Section 1983 actions as follows:

When a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts in actions under the Reconstruction civil rights statutes must give the agency's fact finding the same preclusive affect to which it would be entitled in the State's courts.

2. The impact of this holding:

- a. If the state administrative process meets these standards, any issue of fact resolved against the teacher in the administrative hearing will be resolved against the teacher in any subsequent Section 1983 action.
- b. Thus, there is a significant cost saving potential here for school districts.

3. The elements of an adjudicative hearing:

- a. The United States Supreme Court in the Elliott case referred to its prior decision in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) as setting forth the standard administrative proceedings must meet to be given preclusive effect.
- b. The Utah Construction standard:
 - i. The administrative agency must be acting in a judicial capacity.
 - ii. The administrative agency must resolve disputed issues of fact property before it.
 - iii. The parties must have had an adequate opportunity to litigate these issues before the administrative agency.

- B. The basic elements of an adequate opportunity to litigate.
 - 1. The United States Supreme Court has left this issue for the lower courts.
 - 2. Clearly, if the administrative process contains the eight basic elements of due process specified above, it should meet any requirements for an adequate opportunity to litigate.

IV. The Problem of The Dual Role of The School District's Attorney: Attorney for The Board of Education and Attorney for The School Administration.

A. Legal problems with fulfilling both roles in a teacher termination hearing.

- 1. Several courts have taken the position that playing a dual role is unlawful:
 - a. State ex rel. Ball v. McPhee, 6 Wis.2d 190, 94 N.W.2d 711 (1959). Overruled on other grounds, Stacy v. Ashland County, 39 Wis.2d 595, 159 N.W.2d 630 (1968).
 - b. Yuen v. Board of Education, 77 Ill. App.2d 353, 222 N.E.2d 570 (1966).
 - c. Miller v. Board of Education, 51 Ill. App.2d 20, 200 N.E.2d 838 (1964).
 - d. Harrisburg R-VIII, School District v. O'Brian, 540 S.W.2d 945 (Mo. App. 1976).
 - e. English v. North East Board of Education, 22 Pa. Cmwlth. 240, 348 A.2d 494 (1975).
 - f. Gonzales v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977).
 - g. Weissman v. Board of Education, 190 Colo. 414, 547 P.2d 1267 (1976).
 - h. Lockhart v. Board of Education, 668 P.2d 959 (Colo. App. 1983), aff'd in part, rev'd in part, 687 P.2d 1306 (Colo. 1984).
- 2. Other courts have rejected any per se rule against playing a dual role:

- a. Potemra v. Ping, 462 F. Supp. 328 (S.D. Ohio 1978).
 - b. Niemi v. Board of Education, 103 Mich. App. 818, 303 N.W.2d 905 (1981).
 - c. Thompson v. Wake County Board of Education, 31 N.C. App. 401 (1976), rev'd on other grounds, 292 N.C. 406 (1976).
 - d. Sharon City School District v. Hudson, 34 Pa. Cmwlth. 278, 383 A.2d 249 (1978), superseded by statute as stated in Fry v. Commonwealth, 86 Pa.Cmwlth. 206, 485 A.2d 508 (1984).
3. Still other courts, while rejecting a per se rule have found the dual role played by the attorney in the case before them unlawful.
- a. Yesinowski v. Board of Education, 28 Ill. App. 3d 119, 328 N.E.2d 23 (1975).
 - b. Monahan v. Board of Trustees, 486 P.2d 235 (Wyo. 1971).
4. The better position: don't play a dual role.

B. Practical solutions.

- 1. Appoint another attorney from a different law firm to represent either the administration or board.
 - a. If this option is selected, the regular school district attorney should represent the administration.
 - i. Time and school district money will be saved since the regular school district attorney is as a general rule already at least partially familiar with the facts of the case.
 - ii. If the case goes to court, the regular school district attorney will most likely handle the case. Therefore, that attorney should make the record he or she has to defend. Moreover, this procedure will save the school district money because the regular school district attorney will be intimately familiar with the record in the case and will not have to become

so familiar in order to prepare for trial.

- iii. Negotiations to resolve terminations are better handled by the school district's regular attorney.
- iv. Representation of the administration by the regular school district attorney makes the situation more comfortable for the administration and they are the people who really are on trial at the hearing.
- v. An outside attorney can, without much cost, come in and advise the board of education on procedural matters at the hearing.

b. Countervailing considerations.

- i. The board may come to feel that the regular school district attorney is the administration's attorney and not their attorney.
- ii. In particular cases, the regular school district attorney may need an outside attorney to reinforce advice he has given to the school administration which the school administration has ignored in recommending termination of the teacher.

2. The board of education can conduct the teacher termination hearing without benefit of legal counsel.

- a. This approach should be utilized if the board of education has as one of its members an individual who is an attorney and the rest of the board has confidence in this board member.
- b. If this option is selected, the attorney for the teacher and the attorney for the school administration should stipulate that at the start of the hearing that:
 - i. If procedural questions arise the board should hear from each attorney before the chair rules on the question; and

- ii. If any legal questions arise during board deliberations, the board will consult with both attorneys or neither attorney on any such legal question.

V. Preparation For A Hearing.

A. Review again the entire personnel file.

1. Make sure all relevant documents are in this file.
2. Assemble the documents you intend to offer and make sure any copies made of these documents are clear.
3. Confer with the authors of the documents regarding the following:
 - a. The circumstances surrounding the generation of the document.
 - b. Whether the document was shared with the teacher.
 - c. Whether, and if so, when, the author conferred with the teacher about the document.
 - d. How this document fits into its author's overall evaluation of the teacher's performance and how it fits with other documents authored by this person.
 - e. Review all documents for dating and other possible errors.
 - f. Review for possible uses which the teacher might make of this document, if you introduce it on behalf of the school administration.
 - g. Ask the authors of the documents whether they know of any other documents that teacher might use that would have an impact on this document.
4. Devise and carry out a logical exhibit marking system.
 - a. If possible, mark the exhibits in the order you will introduce them.
 - b. Make copies of the exhibits for the following:

- i. Yourself.
- ii. Each witness you intend to call so that each witness can review the exhibits in preparation for his or her testimony.
- iii. The witness to use while on the witness stand.
- iv. The teacher's attorney.
- v. An official board copy.
- vi. Copies for each board member.
- vii. The court reporter.
- viii. The superintendent of schools if he or she is not a witness.

B. Select your witnesses.

- 1. Use only individuals:
 - a. Who have the duty to observe and evaluate;
 - b. Who have appropriate training in observation and evaluation; and
 - c. Who in fact have observed and evaluated the teacher or whose job it was to decide on the teacher's future after conferring with those who did in fact observe and evaluate the teacher.
- 2. As a general rule don't use:
 - a. Students.
 - b. Fellow teachers.
- 3. The problem of the principal who found no fault, at least on paper.
 - a. Two common examples:
 - i. The kindly principal who supervised the teacher several years ago.
 - ii. The incompetent principal who supervised the teacher recently.

b. Appropriate handling of these situations.

- i. Confer with the principal about his or her evaluation and how he or she accounts for the inconsistency between his or her evaluation and the administration's recommendation.
- ii. Determine whether the principal is supportive of the recommendation of termination or not.
- iii. If the principal is supportive, use him or her as a witness and neutralize the inconsistency through the principal's own testimony.
- iv. If the principal is not supportive of the administrative recommendation, don't use him or her as a witness and prepare to neutralize this inconsistency in other ways.
 - (a) Lay a documentary foundation through other witnesses to discredit this principal's testimony if the principal is called by the teacher.
 - (b) Prepare witnesses to discredit the principal's evaluation, but do not use this strategy unless it is absolutely essential.

4. Leave no witness gaps:

- a. Use witnesses who can and will testify concerning observation and evaluation of the teacher for the entire relevant time period.

5. Don't call unnecessary witnesses if there are no such gaps.

- a. The board will be curious if logical witnesses are not called.
- b. The board will be bored and perhaps angry if superfluous witnesses are called.

C. Prepare witnesses for the hearing.

1. Initial conferences with witnesses.

- a. Review all documents which you intend to use as exhibits at the hearing.
- b. Determine what aspects of the relationship with the teacher the testimony will focus on.
- c. Tie the testimony to the documents.
- d. Include all the witnesses you intend to call in one conference, if at all possible, so that all witnesses see how other witnesses fit in in the hearing.
- e. Discuss what the teacher's defense will be.
- f. Especially make sure there is evidence to support those negative aspects of the teacher's evaluation which are relied upon for the recommendation of termination.
- g. Review this evidence for consistency with appraisal instrument marking categories.
- h. Review documentary errors and discuss how any errors will be explained.
- i. Review documentary "pats on the back" and develop testimony about them to neutralize their effect.
- j. Make sure all district appraisal procedures were followed and, if any deviations, assess their significance.
- k. Make sure of the following:
 - i. The teacher was clearly told what was expected of him or her.
 - ii. The teacher's performance was adequately observed by personnel trained in observation of teaching performance.
 - iii. Any inadequacies in performance were clearly pointed out to the teacher.
 - iv. Appropriate assistance was given to the teacher by the administration to overcome his or her inadequacies.
 - v. The teacher was given sufficient time to incorporate the assistance and to

overcome the inadequacies which were pointed out.

- vi. The teacher was adequately re-observed and re-evaluated.
- vii. Due process (constitutional and statutory) procedures have been followed.
- 1. Make sure witnesses know that they could be sequestered at the hearing and discuss and concerns they may have about this.
- m. Assure the witnesses of your help and that weeding out of incompetent teachers is one of their most important responsibilities.
 - i. Prepare the witnesses for the fact that they will be on trial in the hearing.
 - ii. Let them know you are available at any time to discuss any concerns they may have.
- n. Give witnesses the opportunity to ask you any questions they have at this time.
- 2. Develop the sequence of witnesses and the particular questions you will ask each witness.
- 3. The final conference with witnesses.
 - a. Review with each individual witness the specific questions you will ask him or her.
 - b. Anticipate questions on cross-examination of the witness by the teacher's attorney and rehearse answers to those questions.
 - c. Review documents to be introduced through this witness.
 - d. Review with each witness the rules for being a good witness.
 - i. Tell the truth.
 - ii. Discuss your testimony in advance.
 - iii. Take your time.
 - iv. Be attentive.

- v. Think before you speak.
- vi. Speak clearly.
- vii. If you do not understand a question, ask that it be explained.
- viii. Answer all questions directly.
- ix. Stick to the facts.
- x. Never lose your temper.
- xi. Be fair.
- xii. Don't argue with attorneys or the chairperson.
- xiii. Be helpful, not funny.
- xiv. Don't worry about the rules of evidence.
- xv. Dress sensibly.
- e. Make sure the witness knows when and where he or she is to testify.
- f. Schedule witnesses for a final "last-second-hitch" review session prior to the beginning of the hearing.
- g. Tell the witnesses what to expect procedurally and what the physical layout of the hearing room will be like.
- h. Reassure the witness of his or her importance and the importance of weeding out incompetent teachers.
- i. Give the witness an opportunity to ask any questions he or she may have at this point.
- j. Reassure the witness of your help.
- D. Draft an opening statement (and perhaps a closing statement).
- E. Make sure that appropriate physical amenities of the hearing room are taken care of.
 - 1. Make sure there is space for:
 - a. The school administration's attorney.

- b. The teacher's attorney.
 - c. The witness testifying.
 - d. The court reporter.
 - e. The board so that each board member can see the witness and the attorneys.
- 2. Make sure the acoustics are acceptable.
- 3. Make sure that any equipment to be used in the hearing works.
 - a. Video recorders and television sets.
 - b. Overhead projectors.
- 4. Make sure a room is available for witnesses to use if they are sequestered.
- F. Make sure that public meeting law and/or teacher tenure law notice requirements have been met.
- G. Confer with the attorney for the teacher concerning the following:
 - 1. Procedures at the hearing.
 - 2. Exhibits to be offered.
 - 3. Witnesses who will be called.
 - 4. The anticipated length of the hearing.
 - 5. Any legal objections to the proceedings he or she intends to raise.
- H. Stipulate as much as possible, provided it does not harm the administration's case.
- I. Prepare to meet any legal issues that they attorney for the teacher intends to raise.
- J. Address the issue of legal representation for the board at the hearing and make sure that the board of education understands the basic procedures of a hearing.
 - 1. Basic procedures should be addressed as a part of new board member in-service and reviewed with all board members at the time administrative recommendations of termination are made.

2. A statement for the presiding officer should be prepared.
3. The necessity for confidentiality should be stressed.

K. Get a good night's sleep the night before the hearing!

VI. Basic Outline of a Teacher Termination Hearing.

- A. Chair person calls meeting to order.
- B. A decision is made on whether the hearing will be in open or closed session.
- C. Any procedural problems and any objections of any kind to proceeding with the hearing are decided.
- D. The administration is given an opportunity to make an opening statement.
- E. The teacher is given an opportunity to make an opening statement.
- F. The administration puts on its evidence.
 1. Each witness is sworn.
 2. The administration's attorney questions the witness.
 3. The teacher's attorney cross-examines the witness.
 4. The administration's attorney conducts redirect examination of the witness.
 5. The teacher's attorney is given an opportunity to recross the witness.
 6. Board members are given an opportunity to ask questions.
 7. The administration's attorney is given an opportunity to ask any additional questions occasioned by board member questions.
 8. The teacher's attorney is also given an opportunity to ask any questions occasioned by board member questions.

9. The witness is excused.
 10. The next witness is called and the process repeats.
 11. The administration rests its case.
- G. The teacher's attorney puts on his or her evidence.
1. The witness is sworn.
 2. The teacher's attorney questions the witness.
 3. The administration's attorney cross-examines the witness.
 4. The teacher's attorney is given an opportunity for redirect examination.
 5. The administration's attorney is given an opportunity for recross examination.
 6. Board members are given an opportunity to ask questions of the witness.
 7. The teacher's attorney is given an opportunity to ask any additional questions occasioned by board member questions.
 8. The administration's attorney is given an opportunity to ask any additional questions occasioned by board member questions.
 9. The witness is excused.
 10. The witness is called and the process repeats itself.
 11. The teacher's attorney rests his or her case.
- H. The administration is given the opportunity to put on rebuttal evidence.
- I. The teacher's attorney is given the opportunity to put on any evidence in response to the administration's rebuttal evidence.
- J. The administration is given the opportunity to make a closing statement.
- K. The teacher's attorney is given an opportunity to make a closing statement.

- L. The board withdraws to deliberate privately.
- M. The board comes back into open session to make a decision.
- N. The board notifies the teacher in writing of its decision.

VII. The Problem Of Board Member Bias.

- A. A board member should not participate in a hearing regarding the termination of a teacher if:
 - 1. The board member will testify as a witness.
 - 2. The board member has had direct involvement in the issue before the board.
 - 3. The board member has any other major conflict of interest.
 - 4. The board member cannot for whatever reason base his or her decision only on the facts presented at the hearing.
 - 5. The board member feels it would take more evidence from one side than from the other to convince him or her of the validity of that side's position.
- B. The problem of prior knowledge.
 - 1. As a general rule, prior knowledge of the situation that led to the hearing is not a proper basis for disqualification.
 - a. Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976).
 - b. Graham v. Mars Area School District, 415 A.2d 924 (Pa. Cmwlth. 1980).
 - c. Bishop v. Keystone Area Education Agency No. 1, 275 N.W.2d 744 (Iowa 1979).
 - d. Weissman v. Board of Education, 547 P.2d 1267 (Colo. 1976).
 - e. Ferguson v. Board of Trustees, 98 Idaho 359, 564 P.2d 971 (1977), cert. denied 434 U.S. 939 (1977).

2. Boards have violated teachers' due process rights in certain circumstances where the board went beyond the scope of its duties to obtain prior knowledge.

- a. Keith v. Community School District, 262 N.W.2d 249 (Iowa 1978).

C. Procedures for determining bias.

1. The burden is on the teacher to raise the issue at the earliest possible time.

- a. Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567 (4th Cir. 1975).

2. Should this issue be raised as a matter of course in the board hearing statement?

- a. Des Moines and Houston do.

- b. Omaha does not.

3. Voir Dire procedures if the issue is raised.

- a. The attorney for the board of education, or, if there is no board attorney, the hearing chairperson should inquire concerning the bias of the questioned board member.

- b. The attorney for teacher should submit questions in writing to the board attorney or the chairperson. The board attorney or the chairperson should ask the questions, not the teacher's attorney.

4. How should the issue be decided?

- a. A majority of the board members should decide the issue and the questioned board member should not vote on this issue.

- b. The questioned board member should decide for himself or herself and that decision should be final for purposes of the hearing.

- D. Once the case is scheduled for a hearing, board members should avoid discussing any substantive aspects of the case among themselves, with the parties or their attorneys, or with any known witnesses.

VIII. Rules of Evidence.

- A. Due process does not require the use of the rules of evidence in a teacher termination hearing.
- B. Rationale for not using the rules of evidence.
 - 1. These rules are too technical for laymen or non-trial lawyers to administer.
 - 2. Their use would make the administrative hearing indistinguishable from a court trial, except in its sloppiness.
 - 3. Use of the rules of evidence would be more costly in time and money.
- C. The board should retain the right not to hear irrelevant or unduly repetitious evidence.
- D. Otherwise, the board should err on the side of hearing evidence offered.
- E. Counsel for either the school administration or the teacher should not hesitate to point out the flimsiness of any evidence which is:
 - 1. Hearsay or;
 - 2. Opinion testimony by people not qualified on the record to give an opinion on the issue in question.

IX. The Burden of Proof.

- A. In a teacher nonrenewal hearing where the probationary teacher has no property right in continuing employment and no liberty interest is at stake, the burden of going forward and the burden of the risk of nonpersuasion should both be on the teacher.
 - 1. Any procedure in these cases which places the burden of going forward with the evidence initially on the teacher is problematic, however, because of the analogy of these hearings to hearings on the termination of a tenured teacher where the burden of going forward with the evidence is on the school administration.
 - a. Board members expect to hear the administration's reasons for nonrenewal first; and

- b. Having the administration go forward first helps focus the hearing and makes it run more smoothly.
 - 2. In those cases where the probationary teacher is claiming a liberty interest is at stake or where such a claim is likely to be made later, the initial burden of going forward is on the teacher to establish a prima facie case that his or her nonrenewal rests on a constitutionally impermissible ground. If the teacher meets this initial burden, then the burden of going forward with the evidence shifts to the school administration to refute this evidence by showing that the decision not to rehire the teacher would have been made even if the constitutionally protected conduct had not taken place. Mt. Healthy City School District v. Doyle, 429 U.S. 274, (1977). If the board produces such evidence, the burden of the risk of nonpersuasion remains on the teacher. Morris v. Board of Education, 401 F. Supp. 188 (D. Del. 1975).
 - 3. In tenured teacher termination cases, the burden of going forward with the evidence and the burden of the risk of nonpersuasion are both on the school administration.
- X. The Standard of Proof is The Preponderance of The Evidence Standard.
- A. The preponderance of the evidence is the greater weight of the evidence that is credible and convincing and best accords with reason and probability.
 - B. This standard is distinguished from the criminal law standard of beyond a reasonable doubt.
- XI. Board Member Note Taking and Review of Exhibits.
- A. Board members should be permitted to take notes during the hearing.
 - 1. Sufficient materials to enable board members to take notes should be provided to them at the start of the hearing.
 - 2. This is important since the hearing could stretch over several days or even weeks.

- B. When exhibits are introduced into evidence, board members should be given the time to read the documents.

XII. Transcription of The Hearing.

- A. A court reporter should be used for all tenured teacher termination hearings, all probationary nonrenewal hearings where the probationary teacher is raising or is likely to raise a liberty interest claim, and any other hearings which are likely to be challenged in court.
- B. Tape recording by school district personnel is sufficient for regular probationary nonrenewal hearings.
- C. The chair person should be attentive to the needs of the court reporter to take a break.

XIII. Sequestration of Witnesses.

- A. Such a request by the teacher's attorney should be granted but on the condition that teacher witnesses are sequestered also.
- B. Space should be provided to accommodate this eventuality.
- C. School administrative witnesses should be prepared for this eventuality.

XIV. Board Member Deliberations.

- A. Board deliberations should be done in executive session.
- B. Only board members, the board attorney and the board secretary should be present.
 - 1. The school administration attorney should not be present.
 - 2. The superintendent or any administrator with a personnel function should not be present.
- C. Deliberations should be kept confidential.
- D. Timing of Deliberations.
 - 1. Deliberations should begin immediately after the close of the hearing unless both parties have the

right to submit findings of fact and conclusions of law and have indicated they intend to exercise that right.

2. If the parties have the right to submit findings of fact and conclusions of the law and have indicated that they will exercise that right, deliberations should take place immediately upon receipt of these documents.

- a. The parties should be given only 3 to 5 days to submit the findings of fact and conclusions of law.

E. The board decision should be made in public session.

XV. Board Findings of Fact and Conclusions of Law.

A. Who may prepare these documents?

1. Both parties may submit proposed findings of fact and conclusions of law.

- a. In advance of the hearing.
 - b. Immediately after the conclusion of the hearing.
 - c. See Harvey v. Jefferson County School District No. R-1, 710 P.2d 1103 (Colo. 1985).

2. The board of education after its public decision on the matter may ask the prevailing party to submit proposed findings of fact and conclusions of law and then review those findings of fact and conclusions of law for any necessary alterations and adopt them as its own.

3. The school board attorney may draft the findings of fact and conclusions of law in light of board deliberations.

4. The board of education and the board's secretary may draft the findings of fact and conclusions of law in light of the board's deliberations.

B. Who may not prepare these documents?

1. The teacher's attorney alone or the school administration's attorney alone, in advance of board deliberations.

C. Content of these documents.

1. State law should be reviewed for any requirements it may impose on these documents.
2. Sample findings of fact and conclusions of law are included in the written materials.

SEXUAL HARASSMENT UNDER TITLE VII
OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

B-1

• Seyfarth, Shaw, Fairweather & Geraldson, 1986

I. INTRODUCTORY REMARKS

- A. Seventy to 90% of women reportedly have experienced some form of sexual harassment relating to their employment. (Redbook survey; State of Illinois study)
- B. Number of women in work force is rapidly increasing.
- C. Women are becoming more aggressive in exercising rights, particularly with support of women's groups and other advocates; e.g., N.O.W., WE, Women's Law Project, and Women's Legal Defense Fund.

II. SUMMARY OF SOURCES OF POSSIBLE CLAIMS FOR SEXUAL HARASSMENT

A. OFCCP Regulations

- 1) Relates to government contractors.
- 2) Limited to sexual advances and favors.
- 3) Applies only to supervisor/management personnel performance of their jobs.
- 4) Puts burden on employer to correct violations it becomes aware of.
- 5) Establishes concept that it is improper for supervisor to "grant or recommend a personnel action in exchange for sexual favor."

B. EEOC Guidelines (see Exhibit "A").

- 1) Covers essentially all employers of any size.
- 2) Very vague definition of sexual harassment.
 - a) What is "unwelcome sexual advance"?
 - b) When does "welcome" become "unwelcome"?
- 3) Says that factual determination shall be made, on record as a whole and totality of circumstances, yet later asserts absolute liability in some circumstances.

- 4) Creates absolute liability for acts of supervisors.
- 5) Liability for acts of co-workers may be rebutted by prompt corrective action.
- 6) Query: Does employer have affirmative duty to promulgate policy in accordance with EEOC guidelines?
 - a) What is the effect of taking action?
 - b) What if you don't?

C. Colorado Civil Rights Commission Sexual Harassment Guidelines (see Exhibit "B").

- 1) Sexual harassment prohibited by persons subject to the Act or by their subordinates.
- 2) Sexual harassment includes unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.

III. DEVELOPMENT AND DISSEMINATION OF POLICY AGAINST SEXUAL HARASSMENT

A. Pros/Cons of Having Written Policy

- 1) Pro
 - Written policy has more impact than oral policy.
 - Really major underpinning of any effective program.
 - If you are serious, employees have to know it.
 - Employees must know how to take advantage of your favorable attitude.

— A written policy may serve as an important element in defending a sexual harassment charge

— Some cases have said that if an employer has a policy and it is violated but employer doesn't know it, he can't be held liable.

2) Con

— Policies are just pieces of paper that in and of themselves do nothing, but if they are not followed it can hurt you.

— May be premature, in light of unsettled nature of the law.

— Not specifically required by EEOC regulations.

— Will just give female employees "ideas."

B. Samples of Sexual Harassment Policies

1) Sample government policies (see Exhibits "C-1" and "C-2")

2) Sample corporate policies (see Exhibit "D")

C. Dissemination of Policy

Obviously a policy won't do you any good if no one knows about it. So policy must be disseminated.

1) How extensively do you distribute? How big a deal do you make?

— Post on bulletin boards?

— Give to each employee?

— Give to all new employees?

— At the very least, this policy should be disseminated to the same extent as EEO and other policies.

2) Do you discuss on more "direct" basis where problem is known to exist or is expected?

— Probably an overabundance of caution.

IV. EDUCATING MANAGEMENT/SUPERVISORY PERSONNEL WITH
RESPECT TO SEXUAL HARASSMENT AND COMPLIANCE WITH
COMPANY POLICY

A. Supervisors and managers must be made to understand how critical they are to both effective program and ultimate liability. They are the ones who are going to make or break the program.

1) Most problems involve them in one way or another.

— They are either the harasser, or the most logical management problem-solver.

2) They have best vantage point to see what's going on — is policy being adhered to?

3) They must be made aware of spirit and details of company policy.

4) Supervisors and managers must be "sensitized" to problem of sexual harassment.

— What is "sexual harassment" — like obscenity, they have to know it when they see it.

— They must understand what is expected of them once they are aware of problem.

— Many companies are using outside consultants to do training.

— This educational process should be "renewed" on regular basis.

— This process won't be easy, because many managers and supervisors are going to be guilty themselves, so there will be natural rejection process toward implementing effective program. Others won't take problem seriously.

5) You should have a system for monitoring supervisor performance.

— Review personnel decisions they make; look for trouble areas.

— Keep track of complaints about individuals.

— Give special training to "problem" supervisors.

B. Educating Employees

- 1) Since you can be liable for actions of co-workers, should you conduct employee training?
- 2) Would certainly make policy more effective.
- 3) However, could also be very disruptive and lead to many other problems.

V. IMPLEMENT EFFECTIVE COMPLAINT AND INVESTIGATION PROCEDURE

You can't do anything if you don't know about problem and find out if it's real, particularly if you are absolutely liable.

A. Complaint Process (or Grievance)

You must have a procedure that will make it easy for victim to come forward.

- 1) Females have traditionally been reluctant to come forward with complaints.

- Embarrassment

- Similar to rape cases; the "victim" often goes on trial.

- Fear of retaliation, female employees frequently have no place to go, especially if complaint is against their own supervisor.

- 2) Therefore, they must be put at ease and assured of no retaliation.

- They must be assured they won't be "put on trial."

- They should have someone to go to, other than their own supervisor.

- Some commentators have suggested that complaining employee remain anonymous.

- However, this is very impractical.

- How do you investigate effectively?

-- Better system is simply to assure them that complaint will be handled "discreetly," and then to make sure that it is.

- 3) Best approach is to have all complaints ultimately handled by one person or office --

-- Probably a female should be involved.

-- Easier to train one person to act in most effective way.

-- Easier to ensure even-handed treatment.

-- Easier to find one good "listener" than several.

-- Easier to monitor your overall situation.

B. Investigation Process

- 1) Handle like any EEO investigation.

- 2) Should be thorough -- no holds barred.

- 3) You had better have a good person because this will be tough --

-- Even with all the new definitions, sexual harassment is often in the eye of the beholder.

-- This person must be sophisticated enough to grasp the nuances and implications of situations.

-- Often going to have "her word against his" situation because these things happen in private.

-- Investigator needs intuition.

-- Very emotional issue, so natural reaction of those complained about is to become defensive.

-- Investigator has to be tough.

-- Most accused males won't be particularly straightforward, so investigator has to be persistent.

- 4) Has to be discreet out of fairness to all concerned.
 - Potential slander, invasion of privacy problems.
 - May make situation worse for complaining person.
 - All typing, etc., should be done by one person.
- 5) May want to use "outsider," i.e., someone from corporate staff.
 - This is becoming common in larger companies.
 - Has certain advantages.
- 6) If union involved, don't forget right of accused to have union representative present.
 - This is going to be problem in some cases.
 - Will hurt effectiveness, but so be it.

VI. TAKE PROMPT AND EFFECTIVE CORRECTIVE ACTION
IF HARASSMENT FOUND

- A. Make a decision quickly.
 - 1) Failure to act undermines credibility of system.
 - 2) May amount to employer condonation of conduct for liability purposes.
- B. Offending employees should be dealt with immediately.
 - 1) Should use concepts of just cause and progressive discipline.
 - Make punishment fit crime.
 - Most grievances in this area are on behalf of harasser.

- Forty to 45% of arbitration cases resulted in modifying discipline imposed by employer because it was too severe.
- 2) Offending employee should also be counseled about the nature of the problem and what is expected of him.
- C. Action should not be limited to discipline of offending employee — you should also remedy the effects of what he did.
 - Give promotion that was denied.
 - Reinstate victim if she was fired.
 - Transfer victim, etc.
- D. You may have conflicts with collective bargaining agreements.
 - Union has real political problem putting one member against another.
 - But point is, don't forget that you are bound by agreement.

VII. SYSTEMS FOR IDENTIFICATION OF SPECIAL PROBLEM SITUATIONS — SPECIAL SOLUTIONS

- A. Evaluate situations where problems likely to occur.
 - 1) Situations where men/women have to work closely.
 - 2) Situations where woman occupies job traditionally held by males.
 - Men often react negatively and lash out by trying to demean female by reducing things to sexual context.
 - 3) Situation where there are only a few women in department or area.
 - 4) Department where supervisor has long history of problems.

- B. If problem is identified, take special actions.
 - Counseling.
 - Small group meeting.

VIII. IMPLEMENTATION OF "PREVENTIVE" POLICIES

- A. Consider stricter dress codes to remove temptations and provocations.
- B. Consider policies against dating, socializing or fraternizing with fellow employees.
 - Be careful you don't inadvertently violate some other law or regulation.
 - Dress codes.
 - Nepotism policies.
- C. Counseling managers and supervisors on styles and tactics of management.
 - Double entendres, etc.
 - Touching, etc.
- D. Consider policy with respect to company parties or social events when males and females are together in tempting situations.
- E. Do you have way to monitor non-employees (salesmen, customers, etc.)?

CONCLUSION

- A. Very difficult judgments about what to do.
- B. However, there is a definite legal problem now.
- C. You can't count on being real successful "after the fact."
- D. Ounce of prevention is worth a pound of cure.
- E. Policies and procedures can be very helpful.

effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) by April 23, 1979. In order to come into compliance with the provisions of 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of 1604.10(b) upon implementation.

(44 FR 22808, Apr. 20, 1979)

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship commit-

¹The principles involved here continue to apply to race, color, religion or national origin.

tee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for other persons who were qualified (or but denied that employment opportunity or benefit).

(Title VII, Pub. L. 95-452, 78 Stat. 253 (42 U.S.C. 2000e et seq.))

(48 FR 74677, Nov. 10, 1980)

(b) After interviews based on sex, such as differences in level as for answers, will be reviewed by the Commission by the issuance of Commission orders in cases arising from such issues.

[T 21.035.07]

Sec. 30.7 Discriminatory Wages.—(a) The employer's wage schedule must not be related to or based on the sex of the employee.

Note: The more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort, and responsibility and are performed under similar working conditions.

(b) The employer may not discriminatorily restrict one sex to certain job classifications. In such a situation, the employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units: one (assembly) all female; another (wiring) all male; and a third (circuit boards) also all male. The highest wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the employer must take steps to provide qualified female employees opportunity for placement in job openings in the other two units.)

[T 21.035.08]

Sec. 30.8 Pregnancy and Childbirth.—(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is prima facie discrimination.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination is discriminatory if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d) Childbearing must be considered by the employer to be a justification for a leave of absence for female employees for a reasonable period of time.

Following childbearing, and upon signifying her intent to return within a reasonable time, such female employees shall be reinstated to their original job or to a position of like status and pay without loss of service credits, seniority or other benefits.

[T 21.035.09]

Sec. 30.9 Affirmative Action.—(a) The employer shall take affirmative action to recruit women to apply for those jobs where they have been previously excluded. Such affirmative action may include but is not limited to notifying employment referral agencies that women are welcome to apply for all positions, recruiting at women's colleges, and the use of advertising which is not classified by sex.

[T 21.035.10]

Sec. 30.10 Job Opportunity Advertising.—(a) It is a violation of the Colorado Anti-Discrimination Act as re-enacted, for a help wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such columns headed "Male" or "Female", will be considered as an expression of preference, limitation, specification, or discrimination based on sex.

[T 21.035.11]

Section 30.12. Sexual Harassment.—(a) Harassment which results in discrimination in employment, housing, public accommodations or advertising on the basis of sex is a violation of the Act. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Harassment by persons subject to the Act or by their subordinates is a violation of the Act when, for example, (1) submission to such conduct is made either explicitly or implicitly a requirement of employment, housing, public accommodations or advertising, or, (2) the individual's response to such conduct is used as the basis for decisions which deny to such individual rights protected by the Act.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) The Commission encourages all persons subject to the Act to take steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under the Act, and developing methods to sensitize all concerned.

XYZ CORP. POLICY REGARDING
SEXUAL HARASSMENT IN EMPLOYMENT

- I. It is the policy of the XYZ Corp. that sexual harassment of employees in the workplace is unacceptable and will not be tolerated.

Sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature." Sexual harassment may include such actions as: sex-oriented verbal "kidding," "teasing" or jokes; subtle pressure for sexual activity; physical contact such as patting, pinching or brushing against another's body; or demands for sexual favors.

Conduct of this type is improper if: (a) submission to the conduct is either an explicit or implicit term or condition of employment; (b) submission to or rejection of the conduct is used as a basis for employment decisions affecting the person involved; or (c) the conduct has the purpose or effect of substantially interfering with an individual's work performance or environment.

- II. All management and nonmanagement employees of XYZ Corp. are expected to avoid any behavior or conduct toward any other employee which could be interpreted as sexual harassment.

III. Appropriate management and supervisory personnel shall take prompt, corrective action when they become aware of sexual harassment. Such action may include discipline up to and including termination of the offending employee or employees.

IV. Any employee of XYZ Corp. who feels that he or she has been the victim of sexual harassment should notify his or her supervisor, department head or [other appropriate person, such as the EEO officer]. The complaint will immediately be investigated to determine whether it is justified. If the complaint is found to be invalid, all involved parties will be so notified. If the complaint is found to have merit, corrective action, as described above, will be implemented.

B

Venerable precedent supports our conclusion that Congress reserved the authority to amend not only § 418 but also Agreements entered into "in conformity with" that section. Just last term, we considered a statute in which Congress had "expressly reserved its right to repeal, alter, or amend the Act at any time," *National Railroad Passenger Corp.*, *supra*, at —, and we noted that the "effect of these few simple words" has been settled since the *Sinking-Fund Cases*, 99 U. S. 700 (1879). *Id.*, at —. The *Sinking-Fund Cases* involved federal statutes that governed railroads' obligations to the United States on subsidy bonds. The statutes in question expressly reserved Congress' authority to repeal, alter, or amend them, and Congress exercised that power by requiring the railroads to set aside part of their current income as a sinking fund to meet their debts to the Government as those debts came due. The railroads claimed that this amendment deprived them of property without due process and improperly interfered with their vested rights. *Id.*, at 719. In rejecting those arguments, the Court explained that through the language of reservation, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments as come within the just scope of legislative power." *Id.*, at 720. The effect of the Court's construction of the reservation was to authorize Congress not only to amend the statute granting the railroads' corporate charter but also to change the stipulations of a contract made under that charter subsequent to and independently of the original statute. Whatever the limits of the reserved power, it was "safe to say" that Congress had the authority to provide by amendment whatever rules it might "have prescribed in the original charter" and terms governing the "performance of contracts already entered into." *Id.*, at 721.

This reasoning disposes of appellees' contention that Congress lacked authority to amend California's § 418 Agreement. The State accepted the Agreement under an Act that contained the language of reservation. That language expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself.* We have no doubt that in 1950 Congress could have provided that States electing to enter the Social Security System would not have authority to terminate their participation. Therefore, amended § 418(g) falls well within the limits of Congress' reserved power to alter the law governing performance of § 418 Agreements.

C

The § 418 Agreement provided that its terms were "in conformity with" § 418. Therefore, the Agreement expressly incorporated § 418, which of course was fully subject to Congress' reserved power of amendment. Appellees nonetheless insist that the termination provision embodied in the

Agreement constituted a valuable property right that was "taken" when Congress enacted amended § 418(g). In the *Sinking-Fund Cases*, the Court did observe that Congress' exercise of the reserved power "has a limit" in that Congress could not rely on that power to "take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." 99 U. S., at 720. Similarly, other decisions have held that Congress does not have the power to repudiate its own debts, which constitute "property" to the lender, simply in order to save money. *Perry v. United States*, 294 U. S., at 350-351; see *Lynch v. United States*, 292 U. S., at 576-577.

But the "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself. The provision constituted neither a debt of the United States, see *Perry v. United States*, *supra*, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch v. United States*, *supra*. The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare. Under these circumstances, we conclude that the termination provision in California's § 418 Agreement did not rise to the level of "property." The provision simply cannot be viewed as conferring any sort of "vested right" in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation. Since appellees had no property right in the termination clause, amended § 418 did not effect a taking within the meaning of the Fifth Amendment.

III

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

RICHARD K. WILLARD, Assistant Attorney General (CHARLES FRIED, Sol. Gen., KENNETH S. GELLER, Dpty. Sol. Gen., CHARLES A. ROTHFELD, Asst. to the Sol. Gen., WILLIAM KANTER, and DOUGLAS LETTER, Justice Dept. attys., with him on the brief) for appellants; ANDREW D. HURWITZ, Phoenix, Ariz. (JOHN K. VAN DE KAMP, Calif. Atty. Gen., N. EUGENE HILL, Calif. Sr. Asst. Atty. Gen., and CHARLES C. KOBAYSHI, Calif. Supervising Dpty. Atty. Gen., with him on the brief) for appellees.

No. 94-1979

MERITOR SAVINGS BANK, FSB, PETITIONER v.
MECHELLE VINSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

No. 94-1979. Argued March 25, 1986—Decided June 19, 1986

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties pre-

*The language of § 418 and of California's § 418 Agreement provides further support for this conclusion. Section 418(a)(1) requires that the provisions of § 418 Agreements be "not inconsistent with the provisions of this section." 42 U. S. C. § 418(a)(1), and the Agreement provided that it was "in conformity with" § 418. The State was thus on notice that the terms of its Agreement must mirror the provisions of the section, which could be amended under the reserved power. If Congress amended § 418 in such a manner as to render a provision of an Agreement "inconsistent" or no longer "in conformity" with the section, then the logical conclusion is that the inconsistent provision no longer was to be given legal effect.

sented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment—(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment—the Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission guidelines fully support the view that sexual harassment leading to non-economic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an economic effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability.

243 U. S. App. D. C. 323, 753 F. 2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (the bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she

completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment.* Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson v. Taylor*, 22 EPD ¶30708, pp. 14688-14689, 23 FEP Cases 37, 38-39, n. 1 (D DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

*Like the Court of Appeals, this Court was not provided a complete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

"If [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Id.*, 43.

Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U. S. App. D. C. 323, 753 F. 2d 141 (1985). Relying on its earlier holding in *Bundy v. Jackson*, 206 U. S. App. D. C. 444, 641 F. 2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR §1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U. S. App. D. C., at 327, 753 F. 2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever." *Id.*, at 328, 753 F. 2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.*, at 328, 336, 753 F. 2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U. S. C. §2000e(b), as well as on the EEOC guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U. S. App. D. C., at 332, 753 F. 2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for

rehearing en banc was denied, with three judges dissenting. 245 U. S. App. D. C. 1330, 760 F. 2d 1330 (1985). We granted certiorari, 474 U. S. — (1985), and now affirm but for different reasons.

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (Statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. *Los Angeles Department of Water and Power v. Manhart*, 435 U. S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co.*, 401 U. S. 424, 433-434 (1971), these guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Electric Co. v. Gilbert*, 429 U. S. 125, 141-142 (1976), quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). The EEOC guidelines fully support the view that harassment leading to non-economic injury can violate Title VII.

In defining "sexual harassment," the guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "(u)nwelcoming sexual advances, requests for sexual favors, and other verbal or physi-

cal conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" (i. e., non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74676 (1980). *Rogers v. EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

"[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . ." 454 F. 2d, at 238.

Courts applied this principle to harassment based on race, e. g., *Firefighters Institute for Racial Equality v. St. Louis*, 549 F. 2d 506, 514-515 (CA8), cert. denied *sub nom. Banta v. United States*, 178 U. S. App. D. C. 91, 98, 434 U. S. 819 (1977); *Gray v. Greyhound Lines, East*, 178 U. S. App. D. C. 91, 98, 545 F. 2d 169, 176 (1976), religion, e. g., *Compston v. Borden, Inc.*, 424 F. Supp. 157 (SD Ohio 1976), and national origin, e. g., *Cariddi v. Kansas City Chiefs Football Club*, 568 F. 2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The guidelines thus appropriately drew from, and were fully consistent with, the existing caselaw.

Since the guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F. 2d 897, 902 (1982):

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz v. Dole*, 709 F. 2d 251, 254-255 (CA4 1983); *Bundy v. Jackson*, 205 U. S. App. D. C. 444, 641 F. 2d, at 934-944 (1981); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (ED Wis. 1984).

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers v. EEOC*, *supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, *supra*, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD 130708, at 14692-14693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an economic effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions falls within protection of Title VII.") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 14692, 23 FEP cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U. S. App. D. C. at 328, n. 36, 753 F. 2d, at 146, n. 36, which the District Court apparently admitted into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in deter-

mining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR §1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curias*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and Equal Employment Opportunity Commission as *Amicus Curias* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of

the supervisor's actions. *E.g., Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

"a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and Equal Opportunity Employment Commission as *Amici Curias*, 26.

As respondent points out, this suggested rule is in some tension with the EEOC guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR §1604.11(c) (1985). The guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]," *Taylor v. Jones*, 653 F. 2d 1193, 1197-1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U. S. C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§219-237 (1968). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure,

must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and JUSTICE MARSHALL's opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs v. Duke Power Co.*, 401 U. S. 424, 433-434 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 6. The Guidelines explain:

"Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the

individual in determining whether an individual acts in either a supervisory or agency capacity.

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §§ 1604.11(c), (d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of employer liability with respect to agents and supervisory employees. . . . [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." 45 Fed. Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.¹ The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.² Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E.g.*, *Flowers v. Crouch-Walker Corp.*, 552 F. 2d 1277, 1282 (CA7 1977); *Young v. Southwestern Savings and Loan Assn.*, 509 F. 2d 140 (CA5 1975); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (CA6 1972). Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See *Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes*, 755 F. 2d 599, 604-606 (CA7 1985); *Vinson v. Taylor*, 243 U. S. App. D. C. 323, 329-334, 753 F. 2d 141, 147-152 (1985); *Craig v. Y&Y Snacks, Inc.*, 721 F. 2d 77, 80-81 (CA3 1983); *Katz v. Dole*, 709 F. 2d 251, 255, n. 6 (CA4 1983); *Henson v. City of Dundee*, 682 F. 2d 897, 910 (CA11 1982); *Miller v. Bank of America*, 600 F. 2d 211, 213 (CA9 1979).

The brief filed by the Solicitor General on behalf of the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General

¹The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 419, and n. 11 (1975); see also *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 768-770 (1976).

²For NLRA cases, see, e.g., *Graves Trucking, Inc. v. NLRB*, 692 F. 2d 470 (CA7 1982); *NLRB v. Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.*, 473 F. 2d 374, 384 (CA5 1973); *Amalgamated Clothing Workers of America v. NLRB*, 124 U. S. App. D. C. 365, 377, 365 F. 2d 898, 909 (1966).

concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong; it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. [Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability.] See 29 CFR § 1604.11(c) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy v. Jackson*, 205 U.S. App. D.C. 444, 446, 641 F.2d 934, 936, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. 42 U.S.C. § 2000e-5(b). If the charges appear to be based on "reasonable cause," the EEOC must attempt to eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United States and EEOC as *Amici Curiae* 25. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of

an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

F. ROBERT TROLL JR., Washington, D.C. (CHARLES H. FLEISCHER, RANDALL C. SMITH, and ROSS, MARSH & FOSTER, with him on the brief) for petitioner: PATRICIA J. BARRY, Grover City, Calif. (CATHARINE A. MACKINNON, with her on the brief) for respondents.

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J. DENNISON and HAROLD L. SMALLS,
PETITIONERS v. PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

Syllabus

No. 85-215. Argued March 4, 1986—Decided June 19, 1986

Pennsylvania's Mandatory Minimum Sentencing Act (Act) provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge—upon considering the evidence introduced at the trial and any additional evidence offered by either the defendant or the Commonwealth at the sentencing hearing—finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. The Act, which also provides that visible possession shall not be an element of the crime, operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony, but does not authorize a sentence in excess of that otherwise allowed for the offense. Each of the petitioners was convicted of one of the Act's enumerated felonies, and in each case the Commonwealth gave notice that at sentencing it would seek to proceed under the Act. However, each of the sentencing judges found the Act unconstitutional and imposed a lesser sentence than that required by the Act. The Pennsylvania Supreme Court consolidated the Commonwealth's appeals, vacated petitioners' sentences, and remanded for sentencing pursuant to the Act. The court held that the Act was consistent with due process, rejecting petitioners' principal argument that visible possession of a firearm was an element of the crimes for which they were sentenced and thus must be proved beyond a reasonable doubt under *In re Winship*, 397 U.S. 358, and *Mullaney v. Wilbur*, 421 U.S. 684.

Held:

1. A State may properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt. This case is controlled by *Patterson v. New York*, 432 U.S. 197, which rejected a claim that whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. While there are constitutional limits beyond which the States may not go in this regard, the applicability of the reasonable-doubt standard is usually dependent on how a State defines the offense that is charged in any given case. Here, the Pennsylvania Legislature has made visible possession of a firearm a sentencing factor that comes into play only after the defendant has been found guilty of one of the enumerated crimes beyond a reasonable doubt, and the constitutional limits to a State's power are not exceeded by the Act, which only raises the minimum sentence that may be imposed and neither alters the maximum sentence nor creates a separate offense calling for a separate penalty. *Specht v. Patterson*, 386 U.S. 606, distinguished.

2. There is no merit to petitioners' contention that even though States may treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense, due process nonetheless requires that visible possession be proved by at least clear and convincing evidence. The preponderance standard satisfies due process. Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Nothing in Pennsylvania's scheme warrants constitutionalizing burdens of proof at sentencing.

3. Nor is there merit to petitioners' claim that the Act denies them their Sixth Amendment right to a trial by jury. There is no Sixth

PREVENTING THE FIRST AMENDMENT PROBLEM

- (a) A supervisor is expected to communicate with those under his or her supervision and identify any issues of concern or need.
- (b) The supervisor is expected to resolve the concerns or needs when it is within his or her level of responsibility to deal with and refer those outside the supervisors authority to his or her supervisor.
- (c) Recognize that in a school district or college an employee generally has the right to speak out on issues of public concern. These issues must be on public issues as opposed to ones of individual concern to the employee to be protected by the First Amendment. Even if the speech is on public issues, its utterance is not protected if it creates a disruption which inhibits the achievement of the objective of the school district or college or if it destroys or impairs the working relationship between the employee and his or her immediate supervisors. This right of free speech goes to statements made in private conversations as well as those made in public. The balance which is struck between the protected speech of the employee and the effective operation of the school district or college must be evaluated on a case by case basis.

This right of employees to speak should be recognized but they should be advised that there is an internal process to resolve issues which must be followed administratively to resolve these concerns and needs. In other words, the right to go to the Board or speak out publically is recognized, but the employee should realize that this speech will not short circuit the resolution of the issues through the established procedures.

- (d) When issues are raised publically outside the internal administrative process by an employee, the immediate supervisor should be directed to conduct an investigation and to prepare a report on the issues and recommend what steps, if any, should be taken to resolve any problems which might exist. The immediate supervisor should be expected to resolve issues within his or her level of responsibility as stated in (b).

- (e) Most employees' concerns or needs can be met through verbal communication and an occasional memorandum. Sometimes the employee plays games to set up a supervisor by casually making verbal statements which he or she really wants the supervisor to ignore so the employee can later claim that his or her complaints were not acted upon. If this occurs, the supervisor should have the employee put such matters of concern in writing. If the employee refuses to put this in writing, the supervisor should prepare a specific incident memorandum to document the request and any action taken.

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EMPLOYEE DISCIPLINE:

FIRST AMENDMENT CONSIDERATIONS

* * *

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I. CONNICK V. MYERS, 103 S.Ct. 1684, 51 LW 4436 (1983).

Shiela Myers, who worked as Assistant District Attorney, was informed that she was to be transferred to another section. She was strongly opposed to the transfer and expressed her opposition to several of her supervisors, including District Attorney, Harry Connick. Subsequently, she prepared a questionnaire concerning office conditions and distributed it to the other assistant district attorneys. Connick was informed about the questionnaire and that Myers was creating a mini-insurrection within the office. He informed Myers that she was terminated for refusal to accept the transfer, and also told her that her distribution of the questionnaire was considered an act of insubordination.

Myers filed suit in Federal District Court under 42 U.S.C. § 1983, alleging that she was wrongfully discharged because she had exercised her constitutionally protected right of speech.

The district court found for Myers and stated that the real reason for her termination was the questionnaire and that it addressed "matters of public concern."

The United States Court of Appeals for the Fifth Circuit affirmed on the basis of the district court's opinion.

The Supreme Court granted certiorari, reversed, and in a 5-4 decision held that (1) whether a public employee's speech addresses a matter of public concern deserving of first amendment protection must be determined by the content, form, and context of a given statement, as revealed by the public record, and (2) when a public employee engages in speech touching upon matters of

I. CONNICK V. MYERS, 103 S.Ct. 1684, 51 LW 4436 (1983).

(continued)

public concern in only a most limited sense, then "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 103 S.Ct. at 1690.

II. CONNICK'S PROGENY - VARIATION ON A THEME.

A. Employer Discretion.

Individual employee grievances such as individual salary, job assignment and tenure issues are not constitutionally protected speech. "If the employee's speech cannot be characterized fairly as constituting speech on a matter of public concern, it is unnecessary for the court to scrutinize the reasons for the employee's alleged reprimand." Connick v. Myers, 103 S.Ct. 1684, 1689 (1983).

1. In Renfro v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984), the teacher alleged that she was not rehired because she filed a grievance. In the grievance she expressed her unwillingness to job share with another teacher and asserted her interest in keeping a full-time job.

The Court of Appeals held that a nontenured teacher's grievance, which was based on her unwillingness to share a job with another teacher, did not relate to a matter of public concern and therefore was not protected under the First Amendment. Renfro, at 714.

2. Teacher's speech concerning class assignment is not a matter of public concern, but rather an individual teacher concern, relating to the internal school policy. Further, the court held that public employees may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run. Ferrara v. Mills, 781 F.2d 1508, 1516 (1986); Mahaffey v. Kansas Board of Regents, 562 F.Supp. 887, 890, (D. Kan. 1983).

II. CONNICK'S PROGENY - VARIATION ON A THEME.

A. Employer Discretion (continued).

In Ferrara, as a result of a new class schedule, the teachers class schedule was altered from that which he had traditionally taught. Also, the teacher expressed his disapproval of the practice of filling vacancies within the social studies department with physical education teachers and athletic coaches.

The court states that even though the content of the teacher's speech relates to topics of public concern if the content of the speech is closely related to an employee's personal job status, it may reflect only personal concerns. Ferrara at 1516. Also "It is clear from the context within which Ferrara's speech arose, however, that the speech did not relate to a matter of public concern, within the meaning of Connick." Ferrara at 1515.

3. In Ballard v. Blount, 581 F.Supp. 160, 16 Ed. Law. 1158 (1983), the court held "An individual's [teacher's] salary is an issue personal to the individual and has no relationship to matters of public concern. Also, the manner in which teachers are assigned to teach courses is not a matter of public concern."

As to the issue of tenure the court "concludes that absent unusual circumstances an administrative decision to grant or deny tenure to an individual is not a matter of public concern, and an individual challenging this administrative decision is without First Amendment protection." Ballard at 164-65.

4. In Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), a teacher sued the school district, complaining that he was subject of adverse action because of exercise of constitutional right to speak to the school board on matters of public concern.

The Court of Appeals held that complaints about classroom assignment and evaluation content were not a matter of public concern. However, teacher's speech to school board concerning inequitable mileage allowance for coaches, extent of liability insurance and

II. CONNICK'S PROGENY - VARIATION ON A THEME.

A. Employer Discretion (continued).

grievance procedure were matters of public concern protected by the First Amendment. Knapp at 840-41.

5. In Saye v. St. Vrain Valley School Dist., 785 F.2d 862 (10th Cir. 1986), the plaintiff contended that her right to free speech was violated when the decision not to renew her employment was based in part on her discussion with two parents of the amount of student aide time she had been allocated.

The Court of Appeals agreed with the trial court on this issue. "The allocation of aide time among teachers is not a matter inherently of public concern . . . Moreover, Saye did not raise the aide issue in a public forum, nor did she challenge the total amount of aide time as inadequate. The circumstances in which the discussion here occurred indicate that Saye's speech, like that in Connick, was a mere extension of her dispute with Ploussard (principal) over the amount of aide time she had been given and an attempt 'to gather ammunition for another round of controversy with her superiors.' These factors strongly indicate that Saye was speaking 'not as a citizen' upon matters of public concern, but instead as an employee upon matters only of personal interest." Saye at 866.

In contrast, the court in Saye reached a different conclusion with respect to Saye's claim that her right to association was violated because her termination was in retaliation for her activities as faculty representative.

The court concluded that Saye's union activities were constitutionally protected. However, Saye bears the burden of establishing that her constitutionally protected conduct was a motivating factor in the adverse employment decision. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Saye at 867.

II. CONNICK'S PROGENY - VARIATION ON A THEME.

A. Employer Discretion (continued).

6. In May v. Evansville-Vauderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986), a teacher brought suit against school board, its members and superintendent of school district, who sought to ban religious meetings on school property. Religious meetings were held before the school day began and before the teachers were required to report to their stations.

The court concludes that the controlling principle in this case should be that the workplace is for working and not, unless the employer consents, for holding meetings at which employees can discuss matters of great importance to themselves, perhaps to society as a whole, but not to the employer. May at 1110

The court recognizes the fact that public employee's right of speech has been limited to subjects of public concern Connick v. Myers, 103 S.Ct. at 1689. The court concludes that Mrs. May [teacher] might have a distinctive contribution to make to the public discussion of the policies or management of the public schools of Evansville if her group were discussing those subjects, but instead its meetings are devoted to matters unrelated to the schools. May at 1109.

B. Grievances Shared By Groups Of Employees.

Speech relating to employment concerns shared by groups of employees has received greater protection because it is more likely to express topics of general interest.

1. In McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983), the court stated employee speech is protected only if it is serious enough to hamper the operation of public services. In this case the employee's speech dealt with the rate of compensation for members of the city's police force and, more generally, with the working relationship between the police union and elected city officials.

II. CONNICK'S PROGENY - VARIATION ON A THEME.

B. Grievances Shared By Groups Of Employees.

(continued)

However, employee's speech would not be protected if the employee expresses opinion on an employment issue that does not address public concerns when it would not "assist the public's evaluation of the performance of governmental agencies." McKinley at 1115.

2. In contrast, a dispute arose between a teacher and the administration concerning the scheduling of a program. The teacher contended that 18 teachers also shared her concerns. Gregory v. Durham County Board of Education, 591 F.Supp. 145.

The court stated a teacher who expresses job-related concerns shared by other employees may also be expressing only personal interest when he does not act as a representative of those other employees.

C. Speech on Educational Policies.

If the public controversy which focuses on such issues as curriculum, athletic program or discipline is addressed by the teacher and is not a personal action taken by the teacher, the speech is constitutionally protected. Factors weighed by the courts are (1) is the employee interested in the issue only because of his job; (2) has the issue being addressed reached the public or only co-workers; (3) is there controversy in the community pertaining to the issue?

1. Speech may be so closely related to a teacher complaint that it reflects only personal interest, despite the broader importance of the topic. Gregory v. Durham County Board of Education, 591 F.Supp. 145 (1984).

In Gregory, the co-plaintiff published an article in the teacher's newsletter which threatened the school superintendent's relationship with teachers. The court states "although the issue it addresses are of some legitimate interest to the public, they also have a very significant impact on Toggerson herself as a teacher." Gregory at 153.

II. CONNICK'S PROGENY - VARIATION ON A THEME.

C. Speech on Educational Policies (continued).

2. In contrast, a teacher who publicly criticized his school district's curriculum for Mexican children, the court held that his speech reflected his concerns as a member of his community. Loya v. Desert Sands Unified School District, 721 F.2d 279 (9th Cir. 1983).
3. In Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983), teachers discussed corporal punishment with the parents, made public statements about the unwarranted severity of the licks, and expressed their individual opinion on the question of how coach Walker should be disciplined.

The Court of Appeals held that statements made by assistant coaches concerning corporal punishment imposed on students by head coach were protected by First Amendment.

In the court's analysis, the court believed there was a valid public interest pertaining to what constitutes the proper care and education of children. Coincidentally, the teachers spoke to this issue at the time when parents and community were most concerned. Bowman at 644.

Also, the speech arose in the context of a public debate over the actions of an instructor. It was not part of an internal office grievance as was the case in Connick v. Myers, 103 S.Ct. at 1694. Bowman at 645.

Similarly, a teacher wrote a letter to the newspaper protesting school board's decision to drop junior high track, which had become a public concern, McGee v. South Pemiscot School District, 712 F.2d 339 (8th Cir. 1983). Also, the Ninth Circuit Court of Appeals held that a letter written by the assistant coach to members of school board on a matter of public concern was protected by the First Amendment. Anderson v. Central Point School District, 746 F.2d 505 (9th Cir. 1984).

III. DAMAGES FOR FIRST AMENDMENT RIGHTS.

Memphis Community School District v. Stachura, 106 S.Ct. ___, 54 LW 4771 (1986).

Teacher brought suit, under 42 U.S.C. § 1983, alleging that his suspension deprived him of liberty and property without due process of law and violated his First Amendment rights.

The district court instructed the jury on the standard elements of compensatory and punitive damages and also charged the jury that additional compensatory damages could be awarded based on the value or importance of the constitutional rights that were violated.

The Supreme Court held "the damages instructions plainly authorized - in addition to punitive damages - two distinct types of "compensatory" damages: one based on respondent's actual injury according to ordinary tort law standards, and another based on the "value" of certain rights." Memphis at 54 LW 4772.

The Supreme Court held that damages based on abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in such cases. Memphis at 54 LW 4774.

In its analysis, the Supreme Court stated that in light of 42 U.S.C. § 1983, when plaintiff seeks damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts. See Carey v. Phipps, 435 U.S. 247; Memphis at 54 LW 4773.

Further, "the basic purpose" of § 1983 damages is "to compensate person for injuries that are caused by the deprivation of constitutional rights. Carey at 254. From the analysis of Carey, the court held that the abstract value of a constitutional right may not form the basis for § 1983 damages. Where no injury was present, no "compensatory" damages could be awarded. Memphis at 54 LW 4773.

IV. PRACTICAL CONSIDERATIONS FOR SCHOOL DISTRICTS.

Whether speech in determining is protected, the school board must view the speech in light of its context, form and content.

1. Content of speech is often less important than its context. Context concerns how the opinion arose.

IV. PRACTICAL CONSIDERATIONS FOR SCHOOL DISTRICTS.

(continued)

2. The form of speech - speech in public has strongly been protected as opposed to speech confined to the work place. If delivered at employee meeting or published in newsletter, there is less protection.
3. Whether the teacher is speaking about private concerns or acting as a citizen engaging in public debate.

School boards can exercise greater discretion in regards to:

1. individual salary;
2. teaching assignments;
3. tenure issues.

School boards have less discretion concerning:

1. curriculum;
2. discipline problems;
3. union activity;
4. racial discrimination;
5. worker's compensation.

to have been selected precisely because of his independence from both the Legislature and the Executive. By assigning the reporting functions to the Comptroller General, rather than to the Congressional Budget Office or to the Office of Management and Budget, Congress sought to create "a wall . . . that takes these decisions out of the hands of the President and the Congress."—131 Cong. Rec. H9846 (Nov. 6, 1985) (remarks of Rep. Gephardt) (emphasis added); see also, *e. g.*, *id.*, at H11894 (Dec. 11, 1985) (remarks of Rep. Weiss); *id.*, at E5622 (Dec. 12, 1985) (remarks of Rep. Bedell).

Of course, the Deficit Control Act was hardly the first statute to assign new functions to the Comptroller General; a good number of other duties have been delegated to the Comptroller General over the years. But there is no reason to believe that, in effecting these earlier delegations, Congress relied any more heavily on the availability of the removal provision than it did in passing the Deficit Control Act. In the past, as in 1985, it is far more likely that Congress was concerned mainly with the Comptroller General's demonstrated political independence, and perhaps to a lesser extent with his long tradition of service to the Legislative Branch; neither of these characteristics depends to any significant extent on the ability of Congress to remove the Comptroller General without instituting impeachment proceedings. Striking down the congressional-removal provision might marginally frustrate the legislative expectations underlying some grants of authority to the Comptroller General, but surely to a lesser extent than would invalidation of §251 of Gramm-Rudman—along with all other "executive" powers delegated to the Comptroller General over the years.¹

I do not claim that the 1921 removal provision is a piece of statutory deadwood utterly without contemporary significance. But it comes close. Rarely if ever invoked even for symbolic purposes, the removal provision certainly pales in importance beside the legislative scheme the Court strikes down today—an extraordinarily far-reaching response to a deficit problem of unprecedented proportions. Because I believe that the constitutional defect found by the Court cannot justify the remedy it has imposed, I respectfully dissent.

LLOYD N. CUTLER, Washington, D.C. (HARRY R. VAN CLEVE, General Accounting Office Gen. Counsel, JAMES F. HINCHMAN, GAO Dpty Gen. Counsel, ROBERT P. MURPHY, GAO Atty-Advisor, JOHN H.

¹ Many of the Comptroller General's other duties, including those listed by the majority, see *ante*, at 19, n. 9, appear to meet the majority's test for plainly "executive" functions—*i. e.*, they require the Comptroller General to "(i) interpret a law enacted by Congress to implement the legislative mandate," and to "exercise judgment concerning facts that affect the application of the [law]." *Ante*, at 17. Indeed, the majority's approach would appear to classify as "executive" some of the most traditional duties of the Comptroller General, such as approving expenditure warrants, rendering conclusive decisions on the legality of proposed agency disbursements, and settling financial claims by and against the Government. See 31 U. S. C. §§ 3323, 3626–3629, 3702; F. Mosher, *A Tale of Two Agencies* 159–160 (1984). All three of these functions were given to the Comptroller General when the position was created in 1921. See 42 Stat. 20, 24–25.

I do not understand the majority's assertion that invalidating the 1921 removal provision might make the Comptroller General "subservient to the Executive Branch." *Ante*, at 18. The majority does not suggest that an official who exercises the functions that the Deficit Control Act vests in the Comptroller General must be removable by the President at will. Perhaps the President possesses inherent constitutional authority to remove "executive" officials for such politically neutral grounds as inefficiency or neglect of duty, but if so—and I am not convinced of it—I do not see how that power would be enhanced by nullification of a statutory provision giving similar authority to Congress. In any event, I agree with JUSTICE WHITE and JUSTICE STEVENS that the power to remove an officer for reasons of this kind cannot realistically be expected to make an officer "subservient" in any meaningful sense to the removing authority. Cf. *Humphrey's Executor v. United States*, 295 U. S. 602, 629 (1935).

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No. 85–588

UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS
v. ROBERT B. ELLIOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Syllabus

No. 85–588. Argued April 21, 1986—Decided July 7, 1986

When petitioner University of Tennessee informed respondent, a black employee, that he would be discharged for inadequate work performance and misconduct on the job, he requested an administrative hearing. Prior to the commencement of the administrative proceedings, respondent filed suit in Federal District Court against the University and others (also petitioners), alleging that his proposed discharge was racially motivated and seeking relief under Title VII of the Civil Rights Act of 1964 and the Reconstruction civil rights statutes. The court allowed the administrative proceedings to go forward, resulting in a ruling by an Administrative Law Judge (ALJ) (affirmed by a University Vice President on appeal) that respondent's proposed discharge was not racially motivated. Instead of seeking state-court review of the administrative proceedings, respondent returned to the District Court, which granted summary judgment for petitioners on the ground that the ALJ's ruling was entitled to preclusive effect. The Court of Appeals reversed, holding that respondent's Title VII claim was governed by *Kremer v. Chemical Construction Corp.*, 456 U. S. 461, which held that final state-court judgments are entitled to full faith and credit in Title VII actions, but indicated that unreviewed determinations by state agencies do not preclude trial *de novo* in federal court on Title VII claims. As regards respondent's claims under the other civil rights statutes, the court held that 28 U. S. C. § 1738, which accords a state-court judgment the same full faith and credit in federal courts as it would have in the State's courts, does not require that federal courts be bound by the unreviewed findings of state administrative agencies. The court also declined to fashion a federal common law of preclusion.

Held:

1. Title 28 U. S. C. § 1738 is not applicable to the unreviewed state administrative factfinding at issue here. However, federal common-law rules of preclusion have been frequently fashioned in the absence of a governing statute. Because § 1738 antedates the development of administrative agencies it does not represent a congressional determination that state administrative agency decisions should not be given preclusive effect.

2. The Court of Appeals correctly held that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims, and thus a federal common-law rule of preclusion would not be appropriate. The analysis in *Kremer*, *supra*, and *Chandler v. Roudebush*, 425 U. S. 840, of the language and legislative history of Title VII supports this conclusion.

3. However, when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts in actions under the Reconstruction civil rights statutes must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts (a matter for resolution on remand here). In enacting those statutes, Congress did not intend to create an exception to general rules of preclusion, or to foreclose the adaptation of those rules to such subse-

quent developments as the use of administrative adjudication. Giving preclusive effect in federal courts to the factfindings of state administrative bodies acting in a judicial capacity serves both the value of enforcing repose, which underlies general principles of collateral estoppel, and the value of federalism.

766 F. 2d 982, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I, II, and III of which BRENNAN, BLACKMUN and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and BLACKMUN, JJ., joined. MARSHALL, J., took no part in the consideration or decision of the case.

JUSTICE WHITE delivered the opinion of the Court.

A state Administrative Law Judge determined that petitioner was not motivated by racial prejudice in seeking to discharge respondent. The question presented is whether this finding is entitled to preclusive effect in federal court, where respondent has raised discrimination claims under various civil rights laws, including Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and 42 U. S. C. § 1983.

I

In 1981, petitioner University of Tennessee informed respondent, a black employee of the University's Agricultural Extension Service, that he would be discharged for inadequate work performance and misconduct on the job. Respondent requested a hearing under the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 *et seq.* (1985), to contest his proposed termination. Prior to the start of the hearing, respondent also filed suit in the United States District Court for the Western District of Tennessee, alleging that his proposed discharge was racially motivated and seeking relief under Title VII and other civil rights statutes, including 42 U. S. C. § 1983.¹ The relief sought included damages, an injunction prohibiting respondent's discharge, and classwide relief from alleged patterns of discrimination by petitioner.

The District Court initially entered a temporary restraining order prohibiting the University from taking any job action against respondent, but later lifted this order and permitted the state administrative proceeding to go forward. App. to Pet. for Cert. 27. There followed a hearing at which an administrative assistant to the University's Vice President for Agriculture presided as an Administrative Law Judge (ALJ). The focus of the hearing was on 10 particular charges that the University gave as grounds for respondent's discharge. Respondent denied these charges, which he contended were motivated by racial prejudice, and also argued that the University's subjecting him to the charges violated his rights under the Constitution, Title VII, and other federal statutes. The ALJ held that he lacked jurisdiction to adjudicate respondent's federal civil rights claims, but did allow respondent to present, as an affirmative defense, evidence that the charges against him were actually motivated by racial prejudice and hence not a proper basis for his proposed discharge. *Id.*, at 44-45.

After hearing extensive evidence,² the ALJ found that the University had proved some but not all of the charges against

respondent, and that the charges were not racially motivated. *Id.*, at 177-179. Concluding that the proposed discharge of respondent was too severe a penalty, the ALJ ordered him transferred to a new assignment with supervisor other than those with whom he had experienced conflicts. *Id.*, at 179-181. Respondent appealed to the University's Vice President for Agriculture, who affirmed the ALJ's ruling. *Id.*, at 33-35. The Vice President stated that his review of the record persuaded him that the proposed discharge of respondent had not been racially motivated. *Id.*, at 34.

Respondent did not seek review of these administrative proceedings in the Tennessee courts; instead, he returned to federal court to pursue his civil rights claims. There, petitioner moved for summary judgment on the ground that respondent's suit was an improper collateral attack on the ALJ's ruling, which petitioner contended was entitled to preclusive effect. The District Court agreed, holding that the civil rights statutes on which respondent relied "were not intended to afford the plaintiff a means of relitigating what plaintiff has heretofore litigated over a five-month period." *Id.*, at 32.

Respondent appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the District Court's judgment. 766 F. 2d 982 (1985). As regards respondent's Title VII claim, the Court of Appeals looked for guidance to our decision in *Kremer v. Chemical Construction Corp.*, 456 U. S. 461 (1982).³ While *Kremer* teaches that final state court judgments are entitled to full faith and credit in Title VII actions, it indicates that unreviewed determinations by state agencies stand on a different footing. The Sixth Circuit found the following passage from *Kremer* directly on point:

"EEOC review [pursuant to 42 U. S. C. § 2000e-5(b)] of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. *Batiste v. Furnco Constr. Corp.*, 503 F. 2d 447, 450, n. 1 (CA7 1974), cert. denied, 420 U. S. 928 (1975). Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts. *Garner v. Giarrusso*, 571 F. 2d 1330 (CA5 1978), *Batiste v. Furnco Constr. Corp.*, *supra*; *Cooper v. Philip Morris, Inc.*, 464 F. 2d 9 (CA6 1972); *Voutsis v. Union Carbide Corp.*, 452 F. 2d 889 (CA2 1971), cert. denied, 406 U. S. 918 (1972)." 456 U. S., at 470, n. 7.

The court accordingly held that *res judicata* did not foreclose a trial *de novo* on respondent's Title VII claim.

¹ Respondent's complaint also included claims under 42 U. S. C. §§ 1981, 1985, 1986, and 1988, as well as the First, Thirteenth, and Fourteenth Amendments. App. 17.

² The hearing continued intermittently for more than five months, involved more than 100 witnesses and 150 exhibits, and generated over 5,000 pages of transcript. App. to Pet. for Cert. 27.

³ In *Kremer*, an employee filed a Title VII discrimination charge with the Equal Employment Opportunity Commission, which pursuant to 42 U. S. C. § 2000e-5 referred the case to the New York State Division of Human Rights, the agency charged with administering the State's employment discrimination laws. The state agency rejected the employee's discrimination claim, a judgment that was affirmed both at the agency appellate level and by a reviewing state court. The employee then brought a Title VII action, in which the employer raised a *res judicata* defense. This Court held that under 28 U. S. C. § 1738 the state court's judgment affirming the state agency's finding of no discrimination was entitled to preclusive effect in the employee's Title VII action.

The Sixth Circuit found the question of applying preclusion principles to respondent's claims under § 1983 and other civil rights statutes a more difficult question. It held that 28 U. S. C. § 1738,⁴ which concerns the preclusive effect of "judicial proceedings of any [state] court," does not require that federal courts be bound by the unreviewed findings of state administrative agencies. The court also declined to fashion a federal common law of preclusion, declaring that "[a]t least implicit in the legislative history of section 1983 is the recognition that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court." 766 F. 2d, at 992. The court recognized that a similar argument for denying res judicata effect to state-court judgments in subsequent § 1983 actions was rejected in *Allen v. McCurry*, 449 U. S. 90 (1980), and *Migra v. Warren City School District Board of Education*, 465 U. S. 75 (1984), but distinguished those cases as based on the explicit command of § 1738.

We granted certiorari to consider petitioner's contention that the Sixth Circuit erred in holding that state administrative factfinding is never entitled to preclusive effect in actions under Title VII or the Reconstruction civil rights statutes. 474 U. S. — (1985).

II

Title 28 U. S. C. § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case. However, we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute. See, e. g., *Parklane Hosiery Co. v. Shore*, 439 U. S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313 (1971); *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940); *Stoll v. Gottlieb*, 305 U. S. 165 (1938); *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 289-291 (1906). Although § 1738 is a governing statute with regard to the judgments and records of state courts, because § 1738 antedates the development of administrative agencies it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect. Accordingly, we will consider whether a rule of preclusion is appropriate, first with respect to respondent's Title VII claim, and next with respect to his claims under the Constitution and the Reconstruction civil rights statutes.

III

Under 42 U. S. C. § 2000e-5(b), the Equal Employment Opportunity Commission (EEOC), in investigating discrimination charges, must give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." As we noted in *Kremer, supra*, at 470,

⁴Title 28 U. S. C. § 1738 provides in pertinent part:

"The records and judicial proceedings of any court of any . . . State, Territory or Possession (of the United States), or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such . . . records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

n. 7, it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court.

Moreover, our decision in *Chandler v. Roudabush*, 425 U. S. 840 (1976), strongly supports respondent's contention that Congress intended one in his position to have a trial *de novo* on his Title VII claim. In *Chandler*, we held that a federal employee whose discrimination claim was rejected by her employing agency after an administrative hearing was entitled to a trial *de novo* in federal court on her Title VII claim. After reviewing in considerable detail the language of Title VII and the history of the 1972 amendments to the statute, we concluded:

"The legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964." *Id.*, at 848.

Like the plaintiff in *Chandler*, the respondent in this case pursued his Title VII action following an administrative proceeding at which the employing agency rejected a discrimination claim. It would be contrary to the rationale of *Chandler* to apply *res judicata* to deny respondent a trial *de novo* on his Title VII claim.

Invoking the presumption against implied repeal, petitioner distinguishes *Chandler* as involving a federal agency determination not entitled to full faith and credit under § 1738. Reply Brief for Petitioner 16. This argument is based on the erroneous premise that § 1738 applies to state administrative proceedings. See Part II, *supra*. The question actually before us is whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII. On the basis of our analysis in *Kremer* and *Chandler* of the language and legislative history of Title VII, we conclude that the Sixth Circuit correctly held that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims.⁵

IV

This Court has held that § 1738 requires that state-court judgments be given both issue and claim preclusive effect in subsequent actions under 42 U. S. C. § 1983: *Allen v. McCurry*, 449 U. S. 90 (1980) (issue preclusion); *Migra v. Warren City School District Board of Education*, 465 U. S. 75 (1984) (claim preclusion). Those decisions are not controlling in this case, where § 1738 does not apply; nonetheless, they support the view that Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion. As we stated in *Allen*:

"[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U. S. C. § 1738. . . .

⁵The fact that respondent requested the administrative hearing rather than being compelled to participate in it does not weigh in favor of preclusion. "The legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 48 (1974) (footnote omitted).

"Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." 449 U. S., at 97-98.

The Court's discussion in *Allen* suggests that it would have reached the same result even in the absence of § 1738. We also see no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century.

We have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity. In a unanimous decision in *United States v. Utah Construction & Mining Co.*, 384 U. S. 394 (1966), we held that the factfinding of the Advisory Board of Contract Appeals was binding in a subsequent action in the Court of Claims involving a contract dispute between the same parties. We explained:

"Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. . . . When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.*, at 421-422 (1966) (footnotes omitted).

Thus, *Utah Construction*, which we subsequently approved in *Kremer v. Chemical Construction Co.*, 456 U. S., at 484-485, n. 26, teaches that giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose.⁴ This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, *Allen v. McCurry*, *supra*, at 94, is equally implicated whether factfinding is done by a federal or state agency.

Having federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism. Significantly, all of the opinions in *Thomas v. Washington Gas Light Co.*, 448 U. S. 261 (1980), express the view that the Full Faith and Credit Clause compels the States to give preclusive effect to the factfindings of an administrative tribunal in a sister State. *Id.*, at 281 (opinion of

STEVENS, J.); 287-289 (WHITE, J., concurring in judgment); 291-292 (REHNQUIST, J., dissenting). The Full Faith and Credit Clause is of course not binding on federal courts, but we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion. "Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force," *id.*, at 289 (WHITE, J., concurring in judgment), and this purpose is served by giving preclusive effect to state administrative factfinding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results.⁵ Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *Utah Construction & Mining Co.*, *supra*, at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.⁶

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

An administrative assistant to the Vice President for Agriculture of the University of Tennessee conducted a hearing and determined that respondent's proposed discharge was not racially motivated. The Court today correctly holds that 28 U. S. C. § 1738 does not require that this determination by an administrative assistant be given full faith and credit in subsequent federal litigation. The Court also correctly refuses to fashion a federal common-law rule of preclusion that would bar respondent from litigating his claim against the University under Title VII of the Civil Rights Act of 1964. I agree with these conclusions and therefore join Parts I, II, and III of the Court's opinion.

In Part IV of its opinion, however, the Court concludes that the findings of the administrative assistant may bar respondent's claims under 42 U. S. C. § 1983 and other of the Reconstruction-era Civil Rights Acts. Although its reading of the legislative history of the 1964 Civil Rights Act persuades the Court that it should not interpose a judicially-created bar to the cause of action authorized by that statute, it creates such a bar to claims authorized by the earlier Civil Rights statutes without even mentioning the concerns that prompted their enactment.⁷ As a consequence, the Court's analysis is incomplete and ultimately unconvincing.

Preclusion of claims brought under the post-Civil War Acts does not advance the objectives typically associated with finality or federalism. In the employment setting which concerns us here, precluding civil rights claims based on the Reconstruction-era statutes fails to conserve the resources of

⁴ As one respected authority on administrative law has observed:

"The law of *res judicata*, much more than most other segments of law, has rhyme, reason, and rhythm—something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions—a very great extent—the law worked out for courts does and should apply to agencies." 4 K. Davis, *Administrative Law Treatise* § 21.9, p. 78 (2d ed. 1963).

The Restatement (Second) of Judgments § 83, p. 269 (1982), reaches a similar conclusion:

"Where an administrative forum has the essential procedural characteristics of a court . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court."

⁵ Congress of course may decide, as it did in enacting Title VII, that other values outweigh the policy of according finality to state administrative factfinding. See Part III, *supra*.

⁶ Respondent argues against preclusion on the grounds that the administrative hearing in this case did not satisfy the standard set out in *Utah Construction & Mining Co.*, Brief for Respondent 39-75, and that the ALJ's factfinding would not be given preclusive effect in the Tennessee courts, *id.*, at 99-106. These contentions were not passed upon below, and we leave them for resolution on remand.

either the litigants or the courts, because the complainant's companion Title VII claim will still go to federal court under today's decision.¹ Nor does preclusion show respect for state administrative determinations, because litigants apprised of this decision will presumably forgo state administrative determinations for the same reason they currently forgo state judicial review of those determinations—to protect their entitlement to a federal forum. Cf. *Patsy v. Florida Board of Regents*, 457 U. S. 496, 532–533 (1982) (Powell, J., joined by Burger, C. J., dissenting) (intimating that litigation of unreviewed state administrative determinations in federal court is necessary to encourage exhaustion of state administrative remedies); *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U. S. 100, 136 (1981) (Brennan, J., joined by Marshall, Stevens, and O'Connor, JJ., concurring in judgment) (same); *Moore v. East Cleveland*, 431 U. S. 494, 524, n. 2 (1977) (Burger, C. J., dissenting) (same).

In support of its view that preclusion is required, the Court relies on an analogy to its construction of the Wunderlich Act in *United States v. Utah Construction & Mining Co.*, 384 U. S. 394 (1966). In my opinion, that analogy is seriously flawed. In *Utah Construction*, the Court held that in a dispute arising under a Government contract, factual findings by the Board of Contract Appeals were binding on the Court of Claims. In support of its dictum that the holding was “harmonious with general principles of collateral estoppel,” *id.*, at 421, the Court relied on the fact that Congress had plainly intended the administrative findings in such proceedings to be conclusive.²

¹“The difficulties that will be encountered with this schizophrenic approach [ruling that state administrative findings may establish preclusion as to the claims under these civil rights acts, at the same time as the same issues are relitigated as to the Title VII claim] are obvious. A way out of these difficulties remains to be found. As to any issues that must be retried, with perhaps inconsistent results, it may prove better simply to retry the issues as to all statutory claims. Application of preclusion as to part of the case saves no effort, does not prevent the risk of inconsistent findings, and may distort the process of finding the issues. The opportunity for repose is substantially weakened by the remaining exposure to liability. Insistence on preclusion in these circumstances has little value, and more risk than it may be worth.” 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4471, p. 169 (Supp. 1985).

Moreover, in this case, and presumably in many other cases as well, even the § 1983 claim may be litigated in federal court, at least to the extent of determining whether the complainant was afforded a full and fair opportunity to litigate before the state administrative tribunal. See *note*, at 10, n. 8.

²The Court quoted with approval the following excerpt from the dissenting opinion of Judge Davis in the Court of Claims:

“This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be the fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are the fact-finders for other purposes. In the light of *Bianchi*'s evaluation of the statutory policy, we should not attempt to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 546 (1961); *Fairmont Aluminum Co. v. Commissioner*, 222 F. 2d 622, 627 (4th Cir., 1955). The only rea-

The relevant federal statute in this case is the 1871 Civil Rights Act, not the Wunderlich Act. Needless to say, there is nothing in the legislative history of the post-Civil War legislation remotely suggesting that Congress intended to give binding effect to unreviewed rulings by state administrators in litigation arising under that statute. Quite the contrary, as we explained in *Monroe v. Pape*, 365 U. S. 167, 180 (1961):

“It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”

See *Mitchum v. Foster*, 407 U. S. 225, 238–239, 242 (1972). Cf. *Briscoe v. LaHue*, 460 U. S. 325, 338 (1983). Due respect for the intent of the Congress that enacted the Civil Rights Act of 1871, as revealed in the voluminous legislative history of that Act, should preclude the Court from creating a judge-made rule that bars access to the express legislative remedy enacted by Congress.

Accordingly, I respectfully dissent from Part IV of the Court's opinion.

BEAUCHAMP E. BROGAN, Knoxville, Tenn. (ALAN M. PARKER, CATHERINE S. MIZELL, G. RAY BRATTON, N. RICHARD GLASSMAN, JOHN BARRY BURGESS, TOMMY COLEY, W.J. MICHAEL CODY, and JOHN L. SOBIESKI JR., with him on the brief) for petitioners; RONALD L. ELLIS, New York, N.Y. (JULIUS LAVONNE CHAMBERS, ERIC SCHNAPPER, JUDITH REED, AVON N. WILLIAMS JR., RICHARD H. DINKINS, RUSSELL T. PERKINS, and WILLIAMS & DINKINS, with him on the brief) for respondent.

No. 85-619

MERRELL DOW PHARMACEUTICALS INC., PETITIONER v. LARRY JAMES CHRISTOPHER THOMPSON, ET UX., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Syllabus

No. 85-619. Argued April 28, 1986—Decided July 7, 1986

Respondent residents of Canada and respondent residents of Scotland filed separate complaints in an Ohio state court against petitioner Ohio corporation, the manufacturer and distributor of the drug Bendectin, alleging that children were born with deformities as a result of their mothers' ingestion of the drug during pregnancy. Damages were sought on common-law theories of negligence; breach of warranty, strict liability, fraud, and gross negligence, and also on the ground that the alleged “misbranding” of the drug in violation of the Federal Food, Drug, and Cosmetic Act (FDCA) represented a “rebuttable presumption” of negligence and the “proximate cause” of the injuries. Petitioner filed a petition for removal of the actions to Federal District Court, alleging that they were founded, in part, on a claim “arising under the laws of the United States.” After removal, the cases were consolidated, and the Federal District Court denied respondents' motion to remand to the state court and granted petitioner's motion to dismiss on *forum non conveniens* grounds. The Court of Appeals reversed. Noting that the FDCA does not create or imply a private right of action, the court held that the causes of action did not arise under federal law and therefore were improperly removed to federal court.

sons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion. [*Utah Construction & Mining Co. v. United States*], 168 Ct. Cl. [522], 541–542, 339 F. 2d [606], 618 [1964].” See 384 U. S., at 421, n. 18.

EMPLOYEE DISCIPLINE:

Effects of University of Tennessee v. Elliott

*** * ***

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I. FACTS

Respondent, a black employee of the University of Tennessee, was informed that he would be discharged for inadequate work performance and misconduct. Respondent claimed racial motivation in discharge. (See facts as set forth in Circuit Court decision.)

II. PROCEDURAL STEPS

- A. Request for hearing under Tennessee Uniform Administrative Procedures Act.
- B. Contemporaneous filing of lawsuit in United States District Court.
 - 1. Relief under Title VII of the Civil Rights Act of 1964.
 - 2. Relief under 42 U.S.C. § 1983.
 - 3. Other civil rights statutes and First, Thirteenth and Fourteenth Amendments.
- C. Hearing before Administrative Law Judge.
 - 1. Decision:
 - a. No racial motivation in charges against employee.

II. PROCEDURAL STEPS (continued)

- b. Charges did not support termination but supported transfer.
- 2. Appeal of administrative decision to University official - Affirmation of Administrative Law Judge ruling.
- 3. No appeal to Tennessee Courts on administrative proceedings.
- D. Federal Trial Court proceedings on civil rights claim.
 - 1. Motion for Summary Judgment -
Argued - Improper collateral attack. Preclusive effect of Administrative Law Judge's ruling.
 - 2. Decision - Granted Summary Judgment to the University.
 - 3. Appeal to Sixth Circuit.
- E. Sixth Circuit Court of Appeals, 766 F.2d 981 (1985).
 - 1. Title VII claim - Unreviewed state administrative proceedings are not automatically accorded preclusive effect in an action pursuant to Title VII.
See: Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). RES JUDICATA DOES NOT FORECLOSE A TRIAL DE NOVO ON TITLE VII CLAIM.
 - 2. Section 1983 (and other civil rights claims) - The Court found that 28 U.S.C. § 1783 (governing preclusive effect of state court judgments and records

II. PROCEDURAL STEPS (continued)

in Federal Court proceedings) does not require that Federal Courts be bound by the unreviewed findings of state administrative agencies.

3. Refused to fashion a federal common law of preclusion for § 1983 actions. See: Allen v. McCurry, 449 U.S. 90 (1980) and Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984). (These cases were distinguished from the Elliott case by the Sixth Circuit.)

F. United States Supreme Court, cert. granted, 474 U.S. ____ (1985). University of Tennessee v. Elliott, cited as 46 CCH S.Ct. Bull P. B4620. Opinion by Justice White with Burger, C.J., Powell, Rehnquist, and O'Connor concurring Marshall, J., not participating.

ISSUES AND ANSWERS

ISSUE: Is a rule of preclusion appropriate in a Title VII action where there was an unreviewed state administrative proceedings on the claim?

ANSWER: Unreviewed state administrative proceedings do not have a preclusive effect on Title VII claims. Affirmed decision of Sixth Circuit. See: Kremer, supra, and Chandler v. Roudebush, 425 U.S. 840 (1976).

II. PROCEDURAL STEPS (continued)

ISSUE: Does 28 U.S.C. § 1738 apply to state administrative proceedings?

ANSWER: No.

ISSUE: Should the courts fashion a common law preclusion doctrine in Title VII actions?

ANSWER: No. (See Kremer and Chandler, supra.) Legislative history of Title VII indicates an intent to allow de novo trial.

ISSUE: Does preclusion apply to § 1983 (and other Reconstruction Civil Rights Acts) issues of fact?

ANSWER: Yes

"[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . .

"Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." 449 U.S., at 97-98.

The court further held:

Thus, Utah Construction, which we subsequently approved in Kremer v. Chemical Construction Co., 456 U.S., at 484-485, n. 26, teaches that giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose. This value which encompasses both the parties' interest in

EMP. 8-41

II. PROCEDURAL STEPS (continued)

avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, Allen v. McCurry, supra, at 94, is equally implicated whether factfinding is done by a federal or state agency. 46 CCH S.Ct. Bull. P. at B4630.

and determined finally:

"acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," Utah Construction & Mining Co., supra, at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts. Ibid. at B4631.

DISSENT: Justice Stevens with Brennan and Blackmun concur that Title VII claims are not barred and dissents from that section fashioning a federal common law bar in § 1983 actions.

III. EFFECT OF ELLIOTT

A. Benefits of appealing administrative proceedings:

Query: Should the University of Tennessee have appealed the parts of the administrative decision to transfer rather than terminate?

III. EFFECT OF ELLIOTT (continued)

B. Relief available.

1. Under § 1983.

Compensatory and punitive damages, injunctive and declaratory relief.

2. Under Title VII.

Back pay, injunctive and affirmative relief, front pay, interest, attorney fees, no punitive damages available.

Federal and State Handicap Statutes' Limitations
on Employers' AIDS Policies
(Excerpted from AIDS AT WORK)

David A. Copus
Fay Hartog-Rapp
July 1986

© Seyfarth, Shaw, Fairweather and Geraldson

IV. FEDERAL AND STATE HANDICAP STATUTES' LIMITATIONS ON
EMPLOYERS' AIDS POLICIES

- A. Summary: AIDS and ARC will very likely be considered handicaps under the Federal Rehabilitation Act and most state handicap statutes. Asymptomatic AIDS virus carriers may also be considered to be protected as persons with "perceived" handicaps under the Federal statute and some state statutes. If an employee or an applicant is protected by a handicap statute, the employer may not take adverse action against the person except for job performance reasons, and, unless an AIDS or ARC patient is too ill to perform his or her job satisfactorily or unless the patient has open kaposi's sarcoma skin lesions, the employer must treat him or her as any other employee with a serious medical condition.

If an employee or applicant is protected by a handicap statute, the employer may not use a positive HTLV-III antibodies blood test to take any adverse action against the employee or applicant; although the Federal handicap statute does not per se preclude the administration, rather than use, of such blood tests, some state handicap statutes do.

B. Coverage Of Federal Rehabilitation Act.

1. Section 503: Federal contractors and subcontractors "shall take affirmative action to employ and advance in employment qualified individuals" "to carry out such contract."
 - a. OFCCP regulations extend § 503 obligations to all operations of federal contractors or subcontractors. 41 C.F.R. § 60-741.3 (a)(5). Most employers believe this regulation is invalid. See OFCCP v. Western Electric Co., Case No. 80-OFCCP-29 (1981), reversed and remanded (May 2, 1985).
 - b. Section 503 probably extends only to procurement contracts ["for the procurement of personal property and nonpersonal services (including construction)"]
 - c. OFCCP regulations also state that Federal contractors and subcontractors must "not discriminate" against qualified handicapped individuals. 41 C.F.R. § 60-741.4(a).
2. Section 504: Public and private employers receiving Federal financial assistance are prohibited from discriminating against "otherwise qualified handicapped individuals" under "any program or activity" receiving such assistance "solely" on the basis of their handicap. Section 504 is not limited to situations where the primary objective of federal financial aid is to provide employment. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

An "otherwise qualified individual" is one who can perform the essential functions of the job in spite of his or her handicap. Southeastern Community College v. Davis, 422 U.S. 397, 406 (1979).

Section 504 is probably limited to those specific programs actually receiving Federal financial assistance. See Grove City College v. Bell, 465 U.S. 555 (1984) (Title IX's prohibitions extend only to those portions of a university receiving Federal aid); Chaplin v. Consolidated Edison Co. of NY, No. 79 Civ. 730 (S.D.N.Y. Feb. 14, 1986) (Under Section 504 the program or activity charged with discrimination must be the recipient of federal financial assistance).

Jones v. Metropolitan Atlanta Regional Transit Authority, 681 F.2d 1376, 1379 (11th Cir. 1982), cert denied, 104 S.Ct. 1591 (1984) (Section 504 "applies to programs receiving financial aid of any kind") (emphasis added).

Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694 (D.C. Cir. 1984), cert. denied sub nom. Dept. of Transportation v. Paralyzed Veterans of America, 54 U.S.L.W. 3270 (Oct. 21, 1985) (No. 85-289) (Commercial airlines which use airports that have received federal funds for land acquisition and runway construction are subject to Section 504).

DOE v. Region 13, 704 F.2d 1402 (5th Cir. 1983) (Section 504 covers employment of bus driver by school district that received federal financial assistance for its transportation system).

Pittsburgh Federation of Teachers v. Langer, 546 F. Supp. 434 (W.D. Pa. 1982) (Federal financial assistance to school board is so substantial that entire operation of school system may be considered the "program" receiving aid for purposes of Section 504).

C. Enforcement Of Federal Rehabilitation Act.

1. Section 503: The OFCCP has exclusive authority to enforce Section 503 through its administrative complaint and hearing process; individuals have no private right of action.

See e.g. Davis v. United Airlines, Inc., 662 F.2d 120 (2d Cir. 1981), cert. denied, 456 U.S. 965 (1982) (No private right of action); Beam v. Sun Shipbuilding & Dry Dock Co., 679 F.3d 1077 (3rd Cir. 1982) (same); Painter v. Horne Brothers, Inc., 710 F.2d 143 (4th Cir. 1983) (same); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) (same); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979) (same); Simpson v. Reynolds Metal Co., Inc., 629 F.2d 1226 (7th Cir. 1980) (same); Simon v. St. Louis County, Missouri, 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982) (same); Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981), cert. denied, 459 U.S. 881 (1982) (same); Hodges v. Atchison, Topeka & Santa Fe Ry. Co., 728 F.2d 414 (10th Cir. 1984), cert. denied, 105 S.Ct. 97 (1984) (same).

2. Section 504: Individuals may have a private right to sue their employers under Section 504. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

- D. Definition Of Handicapped Individual In Federal Rehabilitation Act: "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."

E. Coverage Of State Handicap Statutes.

1. Most states prohibit discrimination against handicapped individuals by both public and private employers.

2. Some states prohibit discrimination only by public employers: Alabama, Arkansas, Idaho, Mississippi, and South Dakota.
3. Delaware, Arizona, Wyoming Puerto Rico, and the Virgin Islands apparently do not prohibit discrimination against handicapped persons.

F. State Statutory Definitions Of Handicapped Individual.

1. Several states define handicapped individual in the same way as the Federal Rehabilitation Act.
2. Other states define handicapped individual differently but include those with "a record of such impairment," those "regarded as having such an impairment," or both.

In an unpublished opinion, Michigan Dept. of Civil Rights ex rel. Lonphar v. ARC Carriers, No. 59787 (June 26, 1984), the court ruled that "perceived" handicaps are protected by Michigan handicap statute.

3. Some states do not define handicapped individual.
4. Georgia, Kentucky, and North Carolina permit employers to reject applicants with communicable diseases (and in the case of North Carolina, current employees). New Hampshire excludes coverage for disability caused by illness.

G. AIDS And ARC Patients As Handicapped Individuals

1. District 27 Community School Bd. v. Bd. of Ed. of City of N.Y., No. 14940/1985 (Queens Cty. Sup. Ct. Feb. 11, 1986) (AIDS is a handicap protected by Section 504 of Federal Rehabilitation Act).

2. People of State of N.Y., v. 49 West 12 Tenants Corp., No. 43604/1983 (N.Y. City Sup. Ct. Oct 14, 1983; Dec. 2, 1983; Jan 12, 1984) (Suit for damages and injunction against cooperative apartment board of directors that refused to renew lease of doctor who treated AIDS patients in his apartment-office; the Court found AIDS to be a covered handicap within the meaning of the New York Human Rights Act and issued preliminary injunction prohibiting the doctor's eviction; case settled in favor of plaintiff).
3. Shuttleworth v. Broward County Office of Budget and Management Policy, FCHR No. 85-0624 (Florida Commission on Human Relations April 7, 1986) (On Appeal) (Discharged administrative and management intern with AIDS deemed to be a protected handicapped individual because he "does not enjoy in some manner, the full and normal use of his sensory, mental or physical faculties.").
4. Opinions of the General Counsel of the New York Division on Human Rights, Aug. 9, 1983 and Jan. 30, 1985 (AIDS is a handicap protected by the New York Human Rights Act).
5. Opinion of the Office of Corporation Counsel, District of Columbia, Oct. 15, 1985 (AIDS is a handicap protected by the D.C. Human Rights Act).
6. Florida Commission on Human Relations Investigatory Guidelines Regarding AIDS (undated) (AIDS is a protected handicap under the Florida handicap statute).
7. AIDS Policy Of The Massachusetts Commission Against Discrimination (Undated): (Unlawful "to refuse to hire or advance in employment or otherwise discriminate against a qualified person with AIDS or who is perceived to be at risk of having AIDS" and unlawful "to make a preemployment inquiry as to whether the applicant has AIDS or is at risk of having AIDS").

8. Opinion of Oregon Civil Rights Division Administrator, March 13, 1986 (AIDS, ARC, and positive test result for HTLV-III antibodies are handicaps under state law.)
 9. Maine Human Rights Commission announced on March 17, 1986, that the state's handicap discrimination statute protects AIDS victims.
 10. Philadelphia solicitor announced on March 4, 1986, that the city's handicap ordinance bars employment discrimination against persons with AIDS.
 11. New Jersey Division on Civil Rights has issued an opinion that AIDS is a handicap under the New Jersey Law Against Discriminations.
 12. Media Reports: various reports indicate that state civil rights agencies in Ohio, Texas and California and the Seattle Dept. of Human Rights have informally concluded that AIDS is a handicap protected under the relevant state handicap statute.
 13. Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), cert. granted, ___ U.S.L.W. ___ (April 21, 1986) (No. 85-1277) (Tuberculosis, like any serious communicable disease, is a handicap protected by Section 504 of the Federal Rehabilitation Act.).
- H. Asymptomatic HTLV-III Carriers and Homosexuals As Handicapped Individuals: Will these persons be deemed handicapped under statutes which extend to those persons "perceived" to be handicapped?
- I. Possible Defenses To Employment Of AIDS And ARC Patients And Asymptomatic HTLV-III Carriers.
1. Fear of Transmission To Co-Workers Or Customers.

- a. General Medical Evidence. Because overwhelming medical evidence indicates that HTLV-III is not transmitted by casual work-place contacts, employers will be unable to establish any reasonable basis for excluding AIDS or ARC patients or HTLV-III carriers from the work-place. The only possible exception may be hospitals that wish to exclude persons with positive HTLV-III antibodies test results from performing surgery or other invasive procedures.
- b. District 27 Community School Bd. v. Bd. of Ed. of City of N.Y., No. 14940/85 (Queens Cty. Sup. Ct. Feb. 11, 1986) (The "experts unanimously agree that the virus is not transmitted by casual interpersonnel contact or airborne spread, such as breathing, sneezing, coughing, shaking hands or hugging. . . . Although the present epidemiological and virological information does not support casual contagion through day-to-day activities or contact in the home, school, day-care or foster-care setting, the presence of HTLV-III/LAV in saliva has nevertheless raised parent concern about the possible transmission of the virus through biting. In addressing the issue raised by petitioners [who seek to exclude AIDS victims from school] as to the risk of HTLV-III/LAV transmission through a child with AIDS biting another child or teacher, the opinions expressed by the medical experts on all sides of the case narrowly ranged from the seemingly conservative views of Drs. Giron and Rubenstein ('probably low'; 'certainly possible'; 'cannot give complete assurances') to the more confident judgments of respondents' witnesses ("no danger"; "beyond remote possibility"; "highly, highly improbable"; "highly unlikely"; "not a risk of transmission"). The near unanimity of opinion that biting is an unlikely route of HTLV-III/LAV transmissions in the classroom setting is premised upon epidemiologic data indicating no evidence that saliva has ever been a means of transmission, even among household members exposed to the saliva of infected persons; the 'extremely low' concentration of the virus in saliva as suggested by the infrequency in culturing the virus from saliva of persons with AIDS; the minimal

capacity of younger children to penetrate the skin to the point where enough virus particles could enter the systems of the bitten child; and the relative ease in destroying the virus through the same precautions as are taken in the management of any human bite, namely, careful washing of the wound with soap and water followed by alcohol. . . . [T]here was considerable testimony at trial as to whether HTLV-III can be transmitted in a classroom setting through blood from an injured child with AIDS getting into an open cut of another child or teacher Several doctors dismissed the risk of transmission posed by mixing blood as the result of a school fight as 'generally improbable'; 'wild speculation'; 'extremely, highly improbable'; and 'practically non-existent'. "The "automatic exclusion of children with AIDS from the regular classroom would effect a purpose having no adequate connection with the public health, safety or welfare." The Court criticized "members of the medical community [for their] professionally irresponsible and baseless chracterization of this disease as a 'plague.'").

- c. Phipps v. Saddleback Valley Unitied School District, No. 474981 (Orange Ct. Sup. Ct. Feb. 20, 1986) (Asymptomatic student with positive HTLV-III antibodies test poses no risk and must be allowed to return to school).
- d. LaRocca v. Dalsheim, 120 Misc.2d 697, 467 N.Y.S.2d 302 (Duchess Cty. Sup. Ct. 1983) (In suit by state prisoners to exclude AIDS patients from prison, Court ruled that scientific evidence did not support such exclusion).
- e. Shuttleworth v. Broward County Office of Budget and Management Policy, FCHR No. 85-0624 (Florida Commission on Human Relations April 7, 1986) (Informal determination subject to appeal and hearing on the record) (Employer that terminated AIDS victim failed

to establish "a reasonable basis for its assesment of the risk of injury or death [T]here is an absence of evidence to show with any reasonable probability that AIDS can be transmitted by casual contact that commonly occurs in the workplace.")

- f. AFSCME and State of Minnesota Dept. of Corrections, Case No. 85m-XVI-600-3183 (Gallagher, Dec. 10, 1985) (Arbitrator ordered prison guard reinstated, without pay, after he was fired for refusing to conduct pat searches of prisoners, some of whom might be AIDS patients or HTLV-III test positives; prison management had contributed to the guard's anxiety by distributing inaccurate and inflammatory information on AIDS; available scientific evidence indicates that AIDS "virus cannot be passed by mere touching of the kind that occurs when a pat search is conducted, even if the one searching has cuts on his hands.").
- g. In re United Airlines (Wagner, Jan. 7, 1985) (United Airlines ordered by arbitrator to reinstate a flight attendant with AIDS; United had fired him when he revealed he had AIDS. The Centers for Disease Control's AIDS Task Force Director submitted a letter on behalf of the employee. The employee did not return to work, however, because he was too ill.).
- h. Arline v. School Bd. of Nassau County, 772 F.2 759 (11th Cir. 1985), cert. granted, ___ U.S.L.W. ___ (April 21, 1981) (No. 85-1277) (In order to justify terminating a teacher with tuberculosis, a school board must exercise "a well-informed judgment grounded in a careful and open-minded weighing of the risks and alterantives" and not rely on "simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulations to public prejudice").

- i. New York State Assoc. for Retarded Children v. Casey, 612 F.2d 644, 650 (2nd Cir. 1979) (Because N.Y. State failed to prove "anything more than a remote possibility" of transmission of hepatitis B in the classroom, the state could not exclude mentally retarded children with hepatitis B from school) (Note: Scientists have repeatedly concluded that hepatitis B is more contagious than AIDS).
- j. Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985) (Refusal to hire epileptic unlawful where employer failed to prove "reasonable probability of substantial harm" to others; mere increased risk of harm is insufficient defense).
- k. B&O R.R. Co. v. Bowen, 60 Md. App. 299, 482 A.2d 921 (1984) (Employer may not refuse to hire handicapped individual unless it can show a "reasonable probability" that employment "would be hazardous").
- l. Quinn v. Southern Pacific Transportation Co., 76 Ore. App. 617 (1985) (Railroad may not exclude handicapped individual unless it can show a "reasonable probability" of future injury, despite claim by railroad that, as a common carrier, it had greater duty to protect public safety).
- m. Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619 (9th Cir. 1982) (Under Section 504, employer could not terminate diabetic simply because his blood sugar could not be controlled below certain levels; employer did not establish a direct connection between job performance and the specified blood sugar levels).
- n. OFCCP v. Texas Industries, Case No. 80-OFCCP-28 (June 10, 1981) (Lawful under Section 503 for government contractor to reject handicapped applicant for truck driver position where handicap could without warning interfere with control of truck).

2. Fear Of Injury To Infected Employee

- a. Hayes v. Shelby Memorial Hospital, 726 F.2d 1542 (11th Cir. 1984) (Unlawful sex discrimination to fire pregnant radiation technologist to avoid harm to fetus where employer failed to show by objective, scientific evidence of substantial risk of harm to fetus and failed to explore other temporary jobs).
- b. Taylor v. Rockwell International, Truck Axle Division, Pa. H.R.C. No. E-16027 (1985) (Company can exclude handicapped applicant only if it can establish substantial risk of injury to employee).
- c. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) (Under Section 503, Federal contractor may not refuse to hire handicapped worker because of fear of injury to worker unless it can show exclusion is required by "business necessity and the safe performance of the job.").
- d. Michigan Dept. of Civil rights ex rel. Dingler v. General Motors Corp., No. 36,283-E1 (Michigan Civil Rights Commission Oct. 23, 1979) (The "Legislature did not intent to exclude from employment on basis of possible future injury or disability handicapped persons who are presently able and qualified to work").

3. Future Inability To Perform Job Because Of Anticipated Excessive Absenteeism

Chrysler Outboard Corp. v. DILHR, 14 Fair Empl. Prac. Cas. (BNA) 344, 345 (Wis. Cir. Ct. 1976) (Unlawful to reject applicant with accute lymphocytic leukemia where he could currently perform the job; future inability no defense)

4. Increased Medical Costs

- a. McDermott v. Xerox, 491 N.Y.S. 2d 106 (1985) (Increased benefits cost attributable to hiring obese applicant not sufficient justification to reject applicant, who was deemed to be handicapped).
- b. Folz v. Marriott, 594 F. Supp. 1007 (W.D. Mo. 1984) (Violation of ERISA to terminate employee with multiple sclerosis where employer sought to avoid adverse economic impact on benefit plan) (See also ¶ VI).

5. Refusal Of Coworkers To Work With AIDS Victim

Cases under Title VII of the Civil Rights Act uniformly hold that preference of customers or coworkers is not lawful basis to reduce employment opportunities. See e.g. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971).

J. Accommodation Of AIDS And ARC Patients: Possible Necessity Of Job Restructuring Or Transfer To Alternative Job.

Most handicap statutes probably do not require the employer to restructure a job significantly in order to facilitate performance of the job by a handicapped individual, nor do most statutes require the employer to offer a handicapped employee the opportunity to transfer to another job.

For example, under Section 504, an "otherwise qualified individual" is one who can perform the essential functions of the job in spite of his or her handicap. Southeastern Community College, 422 U.S. 397, 406 (1979).

Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985) (Federal employer's duty to reasonably accommodate under Section 501(b) contemplates accommodation relating only to the employee's present job). But see Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), cert. granted, ___ U.S.L.W. ___ (April 21, 1986) (No. 85-1277) (dictum) (Section 504's obligation to accommodate may require the employer to find the handicapped individual another position if the employer is unable to accommodate the individual in his or her regular job).

- K. Testing For AIDS Antibodies. Regulations under the Federal Rehabilitation Act do not per se prohibit preemployment blood testing for AIDS as long as such testing is part of preemployment physical routinely given to all applicants after a conditional offer of employment has been made. However, if persons with a positive AIDS antibodies blood test are deemed "handicapped" individuals, an employer cannot lawfully reject an applicant based on the blood test results. In addition some state handicap regulations may prohibit preemployment testing, and most if not all state statutes prohibit an employer from discriminating against an applicant with positive test results (assuming such persons are handicapped within the meaning of the applicable state statute). Also, as noted below, some state statutes and local ordinances expressly regulate the use of AIDS antibodies blood tests by employers.

V. FEDERAL AND STATE RACE AND SEX DISCRIMINATION STATUTES' LIMITATIONS ON EMPLOYERS' AIDS POLICIES

- A. Disparate Impact: Would fact that high-risk groups are disproportionately male and minority establish prima facie case of disparate impact?
- B. Sexual Preference
1. Title VII of the Civil Rights Act: Does not prohibit discrimination on the basis of sexual preference. DeSantis v. Pacific Tel & Tel. Co., 608 F.2d 327, 329-330 (9th Cir. 1979).

2. State And Laws: Wisconsin, the District of Columbia, New York City, Boston, Philadelphia, Detroit, San Francisco, Los Angeles, and Austin, Texas, and several other cities prohibit discrimination on basis of sexual preference.

VI. ERISA'S LIMITATIONS ON EMPLOYERS' AIDS POLICIES

Section 510 prohibits an employer from discharging an employee "for purposes of interfering with the attainment of any right to which [an employee] may become entitled" under an employee benefit plan.

In Kross v. Western Electric Company, Inc., 701 F.2d 1238, 1243 (7th Cir. 1983), the court held that the plaintiff stated a claim cognizable under § 510 by alleging that he was discharged for the purpose of depriving him of continued participation in the employer's company-provided life and medical insurance plans.

In Folz v. Marriott Corporation, 594 F. Supp. 1007 (W.D. Mo. 1984), the court found that the employer violated § 510 by discharging an employee with multiple sclerosis to deny him the advantages of certain employee benefit plans.

However, it can be argued that § 510 does not protect an employee who has already qualified for coverage under an employee benefit plan since subsequent actions by the employer cannot be said to have "interfered" with the employee's "attainment" of rights under the plan. See West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) (The legislative history appears to focus on protecting employees whose rights are "about to vest").

VII. OSHA'S LIMITATIONS ON EMPLOYERS' AIDS POLICIES

- A. General Duty: Federal Occupational Safety and Health Act provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 254.

- B. Duty Relating To AIDS: Assuming AIDS poses no meaningful risk in the workplace, the employment of an AIDS or ARC patient does not violate OSHA.
- C. Protection For Employees Protesting Health Hazards. OSHA prohibits an employer from taking any adverse action against an employee who, after first seeking correction of the health hazard from his employer, refuses to expose himself to a health hazard which he in good faith reasonably believes poses a real danger of death or serious injury. If an employer educates the employee about the medical facts of transmission of AIDS, an employee's refusal to work with a coworker who has AIDS will very likely not be protected by OSHA because his fear, while real, will not be "reasonable." Marshall v. Babcock & Wilcox Co., 7 OSH. Cases 2021 (E.D. Mich. 1979).

An employer may also be prohibited from taking adverse action against coworkers who insist on wearing masks and gloves when dealing with AIDS Patients. Bernales v. City and County of San Francisco, No. 11-17001-1 (Cal. Labor Commissioner Sept. 9, 1985) (Dictum).

VIII. COLLECTIVE BARGAINING AGREEMENTS' LIMITATIONS ON EMPLOYERS' AIDS POLICIES

A. The Duty To Bargain Over The Implementation Of An AIDS Policy Under The National Labor Relations Act.

1. The National Labor Relations Board (NLRB) has consistently held that changes in work rules, particularly those carrying disciplinary penalties, affect terms and conditions of employment such that they are mandatory subjects of bargaining.

National Football League Players Ass'n v. NLRB, 503 F.2d 12 (8th Cir. 1974).

Peerless Publications, Inc., 231 N.L.R.B. 244, 255-56 (1977), remanded, 636 F.2d 550 (D.C. Cir. 1980) (Enforcement through disciplinary proceedings of code of ethics is a mandatory subject of bargaining).

Amoco Chemicals, 211 N.L.R.B. 618, 622-23 (1974),
enf'd in pertinent part, 529 F.2d 427 (5th Cir.
1976) (Alteration of work and of disciplinary
rules is a mandatory subject of bargaining).

Leroy Machine Co., 147 N.L.R.B. 1431 (1964)
(Physical examination of existing employees is a
mandatory subject of bargaining).

2. While the NLRB has not yet decided the issue, any proposed AIDS policy will likely be considered a mandatory subject of bargaining.
3. Therefore, that absent waiver of the right to bargain about this subject by the employees' union(s), an employer would be required to give prior notice to the union(s) of any proposed AIDS policy and to bargain with the union(s) about such proposal, if requested to do so.
4. A union may waive the right to bargain about such a proposal by failing to request bargaining after due notice or may already have waived this bargaining right in the past. Such a prior waiver might be evidenced by explicit contract language (such as a zipper clause, or a management rights clause reserving to management the right to make reasonable work rule changes), by the history of negotiations between the parties, and/or by past practice in which the union has permitted changes in work rules to have been made unilaterally.
5. The NLRB will honor only waivers that are clear and explicit, but if a waiver can be established the employer is absolved of having to bargain about the actual content of the proposed AIDS policy.
6. Even in situations where prior notice and bargaining may be required, the National Labor Relations Act does not require that the parties reach agreement, but only that they bargain in good faith. Thus, if the employer and union bargain to an impasse, the employer may be permitted to unilaterally implement the terms of the final offer made to the union prior to impasse.

7. The status of screening of job applicants, as opposed to screening of existing employees, as a mandatory subject of bargaining is unclear. While the NLRB has apparently not yet decided this issue either, the answer is most likely yes.

B. The Right To Unilaterally Implement An AIDS Policy Under The Existing Collective Bargaining Agreement.

1. A challenge to the unilateral implementation of an AIDS policy is more likely to be in the form of a suit for an injunction or a grievance, rather than an NLRB charge.
2. On March 31, 1986, a New York teachers' union filed unfair labor practice charges with the state Public Employment Relations Board against a school district challenging the unilateral adoption of a policy of suspending AIDS patients. (Jamesville-DeWitt Central School District v. New York State United Teachers, Local 2755, PERB Case No. U-8657).
3. Engineers v. Burlington Northern R.R., 117 LRRM 2739 (D. Mont. 1984) (Union obtained an injunction stopping a new company drug testing policy, instituted on public safety grounds, where the policy constituted a material alteration of working conditions; unilateral adoption of such a policy constituted breach of the collective bargaining agreement).
4. If an NLRB charge is filed, the NLRB is likely to defer the case to arbitration under its Collyer policy. See generally Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).
5. Whether the dispute reaches arbitration through the grievance-arbitration procedure, or is deferred to arbitration by the NLRB, the arbitrator will examine both the reasonableness of the AIDS policy and whether its unilateral implementation was permissible under the collective bargaining agreement.

6. In determining whether the unilateral implementation was permissible under the contract, the arbitrator will look to the explicit contract language (such as a zipper clause, or a management rights clause reserving to management the right to make reasonable work rule changes), the history of negotiations between the parties, and the past practice in which the union has permitted changes in work rules to have been made unilaterally.

Southern Pacific Transportation Co., 79 Lab. Arb. 618 (O'Brien, 1982) (Employer did not have the right unilaterally to require all employees going on or while on duty to take a blood-alcohol test when the parties had acquiesced for 50 years in the visual observation of employees as the method of determining whether they were under the influence of alcohol, since the prior well-established practice had become binding condition of employment even though it was not specifically expressed in the collective bargaining agreement).

American Standard, 77 Lab. Arb. 1085 (Katz, 1981) (Employer properly discharged an employee that refused to submit to a drug screen test where the contract contained a broad management rights clause and a provision that specifically gave the employer the right to require a medical examination of any employee "at any time during his employment for the purpose of determining whether or not he is fit for employment").

C. Defending Discharges Of AIDS Patients
Under A "Just Cause" Standard

Virtually all collective bargaining agreements require "just cause" for discharge and subject discharge decisions to a grievance and arbitration processes.

AFSCME and State of Minnesota Dept. of Correction, Case No. 85m-XVI-600-3182 (Gallagher, Dec. 10, 1985) (Arbitrator ordered prison guard reinstated, without pay, after he was fired for refusing to conduct pat searches of prisoners, some of whom might be AIDS patients or HTLV-III test positives; prison management had contributed to the guard's anxiety by distributing

inaccurate and inflammatory information on AIDS; available scientific evidence indicates that AIDS "virus cannot be passed by mere touching of the kind that occurs when a pat search is conducted, even if the one searching has cuts on his hands.").

In re United Airlines (Wagner, Jan. 7, 1985) (United Airlines ordered by arbitrator to reinstate a flight attendant with AIDS; United had fired him when he revealed he had AIDS. The Centers for Disease Control's AIDS Task Force Director submitted a letter on behalf of the employee. The employee did not return to work, however, because he was too ill.).

IX. STATE COMMON LAW WRONGFUL DISCHARGE LIMITATIONS ON EMPLOYERS' AIDS POLICIES

- A. Employment At Will: Traditionally absent a contractual obligation to the contrary, an employer may terminate any employee, at any time, for any reason without liability.
- B. Public Policy Tort Exception: The courts in many states have modified the common law to allow a wrongful discharge action in tort for terminations in violation of public policy.
 - 1. States Where Wrongful Discharge Liability Is Probable: State handicap statutes or considerations of privacy might be a sufficient public policy to support a common law wrongful discharge tort claims.

Lally v. Copygraphics, 173 N.J. Super 162, 413 A.2d 96 (1980), aff'd, 85 N.J. 668, 427 A.2d 1317 (1981) (New Jersey worker's compensation act's prohibition of discrimination against a worker who files a claim constitutes public policy warranting a wrongful discharge tort lawsuit).

Holein v. Sears, Roebuck & Co., 689 P.2d 1292 (Or. 1984) (Oregon wrongful discharge tort action based on claim of sexual harassment is not preempted by availability of state and federal remedies for sex discrimination).

Wynn v. Boeing Military Airplane Co., 595 F. Supp. 727 (D. Kan. 1984) (Federal remedies for race discrimination are not necessarily exclusive because they do not necessarily duplicate Kansas state common law tort remedies).

Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (Title VII does not preempt state common law tort claim for violation of public policy based on refusal to submit to sexual harassment).

Owens v. Parker Drilling Co., 676 P.2d 162, 165 (Montana 1984) (Violation of Montana state handicap statute warrants a common law wrongful discharge suit in tort for compensatory and punitive, as well as actual, damages).

Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (Employer's insistence on polygraph examination for employee suspected of theft, in violation of Pennsylvania statuting barring such use of polygraphs, created violation of public policy; wrongful discharge action in tort approved).

Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (West Virginia wrongful discharge action for violation of public policy of employee privacy allowed where employer fired employees for refusing to take a polygraph exam; each employee had signed an agreement at time of hire agreeing to take a polygraph exam and acknowledging company policy to fire anyone who refused; West Virginia had no statute barring use of polygraphs; nevertheless, the discharged employees won).

2. States Where Wrongful Discharge Is Improbable: In many states, the handicap statute may provide the exclusive remedy for improper discharge.

Buffett v. Warner Communications, 692 F.2d 910 (3d Cir. 1982) (handicap discrimination is not a violation of Pennsylvania public policy actionable as a wrongful discharge claim).

Mein v. Masonite, 109 Ill. 2d 1, 485 N.E. 3d 312 (1985) (Illinois Human Rights Act contains comprehensive set of remedies for age discrimination and thus precludes independent tort action).

Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Calif. 1985), supplemental slip opinion, May 22, 1985 (California Fair Employment and Housing Act preempts claim of wrongful discharge based on theory of sex discrimination).

Strauss v. A.L. Randall Co., 144 Cal. App.3d 514, 194 Cal. Rptr. 520 (1983) (No California common law tort cause of action for age discrimination because preempted by state anti-discrimination statute).

Kamens v. Summit Stainless, Inc., 586 F. Supp. 324 (E.D. Pa. 1984) (Pennsylvania Human Relations Act provides exclusive state remedy for age discrimination).

- C. "Just Cause" Contractual Claim: Undoubtedly, some discharged AIDS patients will file state common law wrongful discharge suits claiming violation of a "contractual" "just cause" standard.

X. STATE COMMON LAW DEFAMATION LIMITATIONS ON AIDS POLICIES

The common law in every state prohibits an employer from defaming an employee by improperly publishing a false statement that an employee has a contagious and loathsome disease. An oral publication of such a statement is slander, and a written publication is libel.

Bratt v. IBM Corp., 467 N.E. 2d 126, 392 Mass. 5087 (1984) ("An employer has a conditional privilege to disclose defamatory [medical] information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job." The conditional privilege is lost if the employer discloses the defamatory medical information recklessly).

The April, 1986 Lambda Legal Defense and Education Fund's AIDS-Update reported that Vernon Saxton, a general manager in a restaurant, was fired from his job after an anonymous letter was sent to the Fayette County [Ohio] Health Commissioner stating that Mr. Saxton had AIDS. The Health Commissioner then sent the letter to Mr. Saxton's employer. His employer read the letter at a general staff meeting. Mr. Saxton, who does not have AIDS, had been employed at the restaurant for 23 years. Suit has been filed on the basis of libel per se against Fayette County, the Commissioner of Health, the restaurant owner and the Frisch Corp., which owns the chain of restaurants, for 1.5 million dollars. Ohio law provides that malice will be implied in a libel situation where one has published information that another person as a "dangerous, contagious, or loathsome disease." Saxton v. Vanzant, Ohio Ct. Comm. Pleas No. 86-civ-59).

XI. AIDS-SPECIFIC LEGISLATION LIMITING EMPLOYERS' AIDS POLICIES

- A. Los Angeles: Persons with or perceived to have AIDS or AIDS-related conditions may not be discriminated against.
- B. San Francisco: Persons with AIDS or any medical signs or symptoms related to AIDS may not be barred from employment; discrimination prohibited based on any perception, real or imaginary, that a person is "at risk for AIDS."
- C. West Hollywood: Discrimination prohibited against persons with AIDS or AIDS-related conditions.
- D. Berkeley: Discrimination prohibited against AIDS victims and employer testing for AIDS antibodies prohibited.
- E. California: Results of blood test to detect antibodies for HTLV-III virus may not be used for employment purposes.
- F. Florida: Results of serologic tests to determine presence of AIDS antibodies may not be used as basis for employment decisions

G. Wisconsin: Employer may not utilize, voluntarily or involuntarily, blood tests for AIDS antibodies or discriminate against anyone who is tested for AIDS antibodies.

H. Denver: City ordinance bars discrimination by city officials against AIDS victims.

XII. STATE UNEMPLOYMENT COMPENSATION LAWS' LIMITATIONS ON EMPLOYERS' AIDS POLICIES

Presumably, employers will be liable for unemployment compensation claims of workers fired because they have AIDS, ARC, or a positive HTLV-III antibodies test.

See also [Anonymous], No. SF-24774 (Mason, ALJ. Sept. 18, 1985) (Life companion of AIDS victim, who was forced to resign his job after employer refused to allow him an unpaid leave to care for his partner, is entitled to unemployment compensation).

XIII. MEDICAL PRIVACY CONSIDERATIONS AS LIMITATION ON EMPLOYERS' AIDS POLICIES

An employer's disclosure of medical information about an employee to other employees may infringe on the employee's right to privacy. Such privacy rights may be protected by state common law, by general state privacy statutes, or by specific state medical privacy laws.

For example, a Massachusetts statute provides that a person "shall have a right against unreasonable, substantial or serious interference with his privacy." General Laws c. 214, § 1B. In Bratt v. IBM Corp., 467 N.E.2d 126, 392 Mass. 508 (1984), the Massachusetts Supreme Court held that disclosure of private medical facts about an employee through an intracorporate communication "is sufficient publication to impair an employee's right to privacy." The court said that, in evaluating whether an employer's disclosure of medical information concerning an employee constitutes an unreasonable interference with the employee's privacy right, a court should "balance the employer's legitimate business interest in disseminating the information against the nature

and substantiality of the intrusion." See also Bratt v. IBM Corp., NO. 85-2545 (1st Cir. March 6, 1986) (Company policy which assures confidentiality of medical information, when coupled with state statute guaranteeing employee's right of privacy, imposed a "heavy burden" on employer to rectify disclosure of medical information without consent of employee).

In California, the Confidentiality of Medical Information Act (Cal Civ. Code Section 56.05 et seq.) requires employers to ensure confidentiality of employees' medical records. Article I of the California state constitution guarantees all its citizens the "inalienable right of privacy." This constitutional privacy right applies to actions by private employers as well as public employers. White v. Davis, 13 Cal. 3d 757, 775 (1975). The California Insurance Code (Section 791 et seq.) prohibits an employer group insurance program from revealing medical information about employees.

The constitutions of at least six states, in addition to California, have specific provisions protecting rights of privacy: Alaska, Arizona, Florida, Massachusetts, Montana and Rhode Island.

Several states have statutes similar to California regarding the confidentiality of medical records.

Connecticut: Conn. Gen. Stat. Ann., 31-128 (1972)

Maine: Me. Rev. Stat. Titl. 6, § 554 (1979)

Maryland: Md. Ann. Code Art. 43, § 4-301; Art. 48A, § 409E(b); Art. 100, 95A(a)(c) (1979)

Wisconsin: Wis. Stat. Ann. § 103-13 (1979, Supp. 1983)

Eddy v. Brown, No. 62086 (Okla. Supreme Ct. Feb. 25, 1986) (Employer's limited disclosure of employee's psychiatric history is not common law invasion of privacy, which requires general public disclosure before it is actionable).

XIV. STATE AND LOCAL STATUTES ON COMMUNICABLE DISEASES

- A. District 27 Community School Bd. v. Bd. of Ed. of City of N.Y., No. 14940/1985 (Queens Cty. Sup. Ct. Feb. 11, 1986) (AIDS is not "communicable disease" within meaning of relevant New York statutes).

- B. Opinion of Corporation Counsel, District of Columbia, Oct. 15, 1985 (AIDS is a "communicable disease" within meaning of D.C. Health Code which prohibits employment of AIDS victims in hospital jobs involving direct patient care or in "work involving contact with unprotected food for human consumption."
- C. Newark, New Jersey Food Handlers Ordinance: Employers are prohibited from employing food handler if he/she is "ill or infected with a communicable disease which would make him/her unfit for the safe handling of foodstuff intended for or suited for human consumption."
- D. Florida Administrative Code. The Florida Administrative Code Rule 10D-3.93 prohibits any employment of persons with "reportable diseases" such as AIDS unless the "situation no longer presents a public health hazard as determined by health officials." Another provision of the Florida Administrative Code, Rule 10D-28.74(3), prohibits employment in a hospital of anyone with a "communicable disease which would present the hazard of transmission to patients or other employees." Rule 10D-3.76(2) of the same code requires food service employers to notify health officials of any employee with a "reportable disease" such as AIDS. A Florida statute, Section 509.221(a), Fla. Stat., prohibits the employment in any public food service establishment of anyone with a communicable disease.

XV. EMPLOYER'S LIABILITY FOR FAILURE TO INFORM EMPLOYEE BEING TESTED WHERE POSITIVE TEST RESULTS ARE DETECTED BY PHYSICAL EXAMINATION.

- A. Basic Obligation To Inform: An employer who undertakes to make a physical examination of his employee may be under a duty to inform the employee of any dangerous, or potentially dangerous, disease or condition disclosed by that examination.

Union Carbide & Carbon Corp. v. Stapleton, 237 F.2d 229 (6th Cir. 1956) (Plaintiff charged his former employer with negligence in failing to inform him of a tubercular condition disclosed by X rays taken in employer's medical department. The court held that although the employer may be under no initial obligation to undertake the examination, when it does

do so the employee is entitled to rely on the expectation that he will be told of any dangerous conditions disclosed, and the employer may be liable for the negligent omission to advise him of such dangerous condition).

- B. Level Of Knowledge Required: It is not clear whether it must be shown that an employer had actual or presumed knowledge of the results of a physical examination before the employer may be liable for the failure to inform the employee of a disease or physical condition discovered in that examination.

Lotspeich v. Chance Vought Aircraft, 369 S.W.2d 705 (Tex. Civ. App. 1963) (Where records showed that the employer did not have knowledge of its employee's tubercular condition, even though he may have negligently failed to discover the employee's disease, the employer was not liable, since it owed no legal duty to the employee to discover and disclose to her the fact that she had tuberculosis).

But see Coffee v. McDonnell-Douglas Corp., 8 Cal.3d 551, 503 P.2d 1366 (1972) (Employer was held liable where the laboratory report of an employee's blood analysis, which would have revealed the inflammatory condition of which the employee was not aware, was filed away without review in accordance with corporate procedure. The jury found that the failure to discover the disease was a consequence of the employer's negligence).

- C. Liability To Others: The failure of an employer to inform its employee of a contagious disease, disclosed in a physical examination of the employee, might give rise to a cause of action by one who contracts the disease from the employee.

Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351 (1959) (Wife of an employee was held to have stated a cause of action against her husband's employer where she alleged the contraction of tuberculosis from her husband, who had not been informed of her tubercular condition which was allegedly disclosed in X rays taken by doctors employed by the defendant).

XVI. EMPLOYERS' OBLIGATION TO WARN EMPLOYEES
OF HEALTH HAZARDS ASSOCIATED WITH AIDS

- A. Basic Obligation To Inform: Section 492 of the Restatement of Agency (Second) states:

A master is subject to a duty that care be used either to provide working conditions which are reasonably safe for his servants and subservants, considering the nature of the employment, or to warn them of risks of unsafe conditions which he should realize they may not discover by the exercise of due care.

Thus, an employer must either provide a safe workplace or warn employees of health hazards. This duty applies to risks created by the employer, by third persons, or by natural causes. § 492, comment 9.

- B. Liability For Failure To Warn: State courts have imposed liability on employers where the employers have negligently or intentionally failed to warn employees of known health hazards in the workplace. See Pigeon v. W.P. Fuller & Co., 156 Cal. 691 (1909) (In a pre-worker's compensation act case, employer was liable where it failed to warn employee that inhalation of fumes and vapor in workplace could cause lead poisoning and paralysis).

Louch v. Salvation Army, 81 Ohio App. 317, 75 N.E.2d 459 (1947) (Employer liable if he negligently hires or retains employee with contagious disease in food handling position).

- C. Possible Preemption Of Employees' Claims
By Workers' Compensation Statutes.

However, injuries resulting from the breach of the duty to warn are generally regarded as being encompassed by state workers' compensation statutes.

In Kofron v. Amoco Chemicals Corp., 441 A.2d 226 (Del. 1982), workers who claimed that they had contracted diseases as a result of exposure to asbestos brought actions against their employers. The Delaware Supreme Court held that claims for gross negligence and intentional tort were encompassed by the Delaware workers' compensation statute and thus could not be maintained under the common law.

But in Blakenship v. Cincinnati Milacrom Chemicals, Inc., 433 N.E.2d 572 (Ohio 1982), where the plaintiff employees sought damages arising out of their exposure to the "fumes and otherwise noxious characteristics of certain chemicals," the Ohio Supreme Court held that the Ohio workers' compensation statute did not preclude the plaintiffs from enforcing common law intentional tort claims against their employer.

D. Employers' Obligations To Coworkers Of An Employee With AIDS.

Assuming AIDS poses no measurable risks in the workplace, an employer has no obligation to his employees to inform them that a coworker has AIDS.

XVII. OBLIGATION OF EMPLOYER TO COWORKERS WHO REFUSE TO WORK WITH AIDS-INFECTED EMPLOYEE

A. "Protected Concerted Activity:"

Refusal to work with an AIDS patient might be "protected concerted activity" under the National Labor Relations Act ("NLRA"). Section 7 of the NLRA protects employees' right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The guarantees and protection of Section 7 are afforded equally to nonunion employees and union employees. Even if a refusal to work is protected by Section 7, the employer may still hire "permanent replacements" for employees who refuse to work, provided the employer is not engaged in an unfair labor practice.

B. Basis For Refusal To Work.

In NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), the Supreme Court held that when employees acting in concert to protest the existence of what they in "good faith" perceive to be unsafe working conditions withhold their labor from the employer for such purpose they are considered to be engaged in concerted activity protected under section 7 of the NLRA. Thus, employees who collectively refused to work in subzero weather were protected from discipline or discharge by section 7, so long as they were acting in a good faith belief that they were in serious danger.

Since Washington Aluminum, many recent NLRB decisions have added a "reasonableness" requirement as part of the test. See e.g. Daniel Construction Co., International, 267 N.R.L.B. 1213 (1983) (NLRB found that the dangers feared by the employees were inherent in the jobs and were well known by them when they assumed employment; therefore, refusal to work was not reasonable).

But see Quality C.A.T.V., Inc. and Boyle, 278 N.L.R.B. No. 156 (March 27, 1986) (Reasonableness of concerted refusal to work in uncomfortable conditions irrelevant; as long as concerted refusal was neither violent nor disruptive of other employees' work, concerted refusal to work is protected).

Many unions waive the right to refuse to work through agreement to a no-strike clause in collective bargaining agreements. However § 502 of the NLRA protects union work stoppage despite the existence of a no-strike clause where union has "ascertainable objective evidence" that continuing to work would subject employees to "abnormally dangerous" conditions. Gateway Coal Co. Mine Workers, 414 U.S. 368 (1974).

C. Single Employee Action.

1. Collective Bargaining Agreement:

Under the NLRB's Interboro rule, a single employee's effort to enforce provisions of a collective bargaining agreement may be protected concerted activity under Section 7, even in the

absence of a showing of similar interest by his or her fellow employees. Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2d Cir. 1967). The Supreme Court endorsed the Interboro rule in NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984) (individual employee's assertion of a collectively bargained right to refuse to drive trucks in unsafe condition is "protected concerted activity" if the assertion is based on a reasonable and honest belief that the employee is being asked to do something not required by the contract and if the assertion reasonably is directed toward enforcement of collectively bargained rights).

2. No Collective Bargaining Agreement:

Where no collective bargaining agreement is in effect, the NLRB has ruled that for an employee's activity to be "concerted," that activity must be engaged in with or on the authority of other employees. Meyers Industries, Inc., 268 N.L.R.B. No. 73 (1984). Thus, in Meyers, the Board held that a nonunion truck driver's lone complaints about the safety of a truck, which culminated in his having the truck inspected by a state agency, did not constitute concerted activity because he was not authorized by other workers.

D. AIDS As A Basis For Refusing To Work

Assuming an employee or group of employees' refusal to work with an AIDS-infected employee is concerted activity, such refusal to work will be deemed protected concerted activity under the NLRA only if the employee or employees are acting in a good faith (and, perhaps, reasonable) belief that they are in serious danger. In the AIDS context, a requirement that the employees' belief in the dangerousness of working with an AIDS-infected employee be reasonable can make an enormous difference. The issue has not yet been presented to the NLRB. In the meantime, informing employees of the facts about AIDS appears to be the best way for an employer to both prevent other employees from refusing to work with AIDS-infected employees and prevent the NLRB from finding such refusals to work to be conduct protected by the NLRA.

XVIII. THE REACH OF ELEVENTH AMENDMENT SOVEREIGN IMMUNITY
PROTECTION FOR STATE GOVERNMENT EMPLOYERS

- A. The Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court held that the 11th Amendment barred a citizen from bringing a suit against his own state in federal court.

Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985) (Eleventh Amendment bars suit under Section 504 against the state).

- B. Prospective Relief. The Supreme Court has, however, allowed suit where only prospective injunctive relief is sought. Ex Parte Young, 209 U.S. 123 (1908).
- C. Political Subdivisions. Political subdivisions such as counties and municipalities do not enjoy the protections of the 11th Amendment, even though such entities exercise "slice of state power."
- See Mt. Healthy Board of Ed. v. Doyle, 429 U.S. 274 (1977) (School district held to be "a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend"); Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973) (California county is not an "arm of the State," but is political subdivision thereof).
- D. Hybrid Jurisdictions. However, some agencies exercising state power have been permitted to invoke the 11th Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the state itself. See Edelman v. Jordon, 415 U.S. 651 (1974) (Eleventh Amendment barred retroactive monetary award even though it was directed against a state

official individually because it could be satisfied only from the general revenues of Illinois); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) (Action against Indiana department of treasury and state officials seeking refund of gross income taxes was barred by Eleventh Amendment because action was in essence one for the recovery of money from the state). Problems arise in classifying certain entities: school districts, state universities and community colleges, and regional planning authorities. Sanders v. Washington Metropolitan Transit Authority, Civ. Action No. 84-3072 (D.D.C. Jan. 9, 1986) (WMTA, created by an interstate compact, enjoys Eleventh Amendment immunity).

- E. Waiver. Some states have waived their sovereign community. See e.g. Section 768.28 of Florida Statutes (statute puts limit on liability of \$100,000 per person and \$200,000 per incident).

XIX. MORAL AND ETHICAL CONSIDERATIONS RAISED BY AIDS IN THE WORKPLACE.

The moral and ethical issues presented by AIDS at work are both difficult and compelling. Although they are beyond the scope of this paper, they are profound and will significantly impact employers' decisions.

XX. CURRENT CORPORATE POLICIES ON AIDS

A. Most Employers Have Not Adopted Special Policy On AIDS

1. Results Of Poll By American Society For Personnel Administration: In February, 1986, the American Society for Personnel Administration announced the results of a nationwide poll of 278 companies.

- 9 (3%) had formal written policies for dealing with employees who contract AIDS. Two other companies had informal policies.

- ° 8 of the 9 companies with formal written policies provide for continuation of benefits; none of the policies require immediate termination; two offer paid leave, while five offer unpaid leave.
- ° 26 (9%) have employees who are AIDS victims.
- ° 1 company tests its employees for the AIDS virus. Twenty-six (9%) companies make the AIDS antibodies test available to employees who want to take it.
- ° 8 (3%) require employees to inform their supervisors if they are diagnosed as having AIDS.
- ° 5 (2%) said they would terminate a coworker who refused to work with an AIDS victim; 5 would transfer the coworker; 6 would isolate the AIDS victim; 43 (15%) said would seek to educate coworkers before considering discipline.

2. Results Of Poll By Bureau Of National Affairs:
On March 11, 1986, the Bureau of National Affairs announced the results of its nationwide poll of 238 companies, employing about 1,000,000 workers:

- ° 18 (8%) had one or more cases of AIDS reported in their workforces.
- ° 4 (2%) had written policies on the employment or benefit status of employees with AIDS. Another 51 (21%) are considering such policies.
- ° 214 (90%) indicated their health insurance plans cover AIDS-related medical problems.
- ° 8 (3%) have tested employees for AIDS antibodies and 2 have tested job applicants.

- ° 1 of the 18 companies which has employed an AIDS victim terminated the employee. Twelve kept the AIDS victim in their same jobs; four transferred them to other jobs; six offered them, but did not require, disability leave.
- ° 3 of the 17 organizations retaining AIDS victims reported no problems from coworkers; four companies permitted concerned coworkers to transfer; eight held group educational meetings.
- ° 45 (19%) of the firms have undertaken efforts to educate their workforce.
- ° 147 (53%) had not read the Centers for Disease Control workplace guidelines.

B. Most Common Policy Where A Policy Exists:

1. Education. Focus of most policies is on educating employees about the disease; education about the disease reduces unwarranted fears. In addition, employees are informed about the risk factors for contracting the disease and encouraged to take the necessary steps to protect themselves from contracting the disease.

Some employers have arranged for specialized communications: lectures for managers by experts on AIDS; video presentations which can be checked out for home viewing; and bi-monthly newsletters with updates on AIDS.

2. Benefit Consultation: Some policies provide benefit consultation to assist AIDS-affected employees in effectively managing health, leave, and other benefits.
3. Personal And Confidential Nature Of Illness: Some policies emphasize that an employee's health condition is personal and confidential. Reasonable precautions should be taken to protect information regarding an employee's health condition.

4. Sensitivity To Employees: Some policies instruct supervisors to be sensitive and responsive to non-AIDS affected employees' concerns and to suggest education.
5. Written Medical Certification: Some policies require an AIDS-affected employee to obtain a written medical opinion that his/her illness is non-infectious to other persons in ordinary work contact and that the employee is medically fit to work.
6. Testing: Very few policies require employees to be tested for exposure to AIDS, and even fewer test job applicants for exposure to the disease.

XXI. CONSIDERATIONS IN DEVELOPING A CORPORATE POLICY*

A. Educate Policy Makers.

At a minimum, corporate policy makers should understand the law relating to AIDS patients and the scientific evidence regarding the casual transmission of AIDS in the workplace. Policy makers should also understand the possible range of co-worker reactions to an AIDS patient and the direct and indirect economic costs associated with employees who have AIDS. Finally, policy makers should review the moral and ethical considerations inherent in dealing with AIDS patients.

Policy makers must grasp the basic issues in each of the foregoing areas in order to formulate a policy, even if they decide on a reactive, rather than a proactive, policy.

*/ Much of the material in this section is adapted from AIDS In The Workplace Manual, 1986, Business Leadership Task Force of the Bay Area.

B. Maintain High Worker Productivity.

Employers obviously want to avoid workplace disruptions caused by co-workers who refuse to work with an AIDS patient.

C. Protect Health And Welfare Of Employees.

Employers must provide a safe and healthy work environment and should address employees health concerns.

D. Manage Health Care Costs.

Employers can significantly reduce benefits costs by pursuing flexible treatment programs and by returning employees on the job as long as they are able to work.

E. Comply With Legal Restraints. Few is any employers will deliberately flaunt the law. Moreover, employers have a high need to maintain the appearance, as well as the fact, of maintaining lawful practices.F. Promote A Responsible Image To Employees And The Public. Employers must deal with the moral and ethical issues raised by AIDS in a manner which will strengthen their public image.XXII. CORPORATE POLICY OPTIONSA. Centralized Decision Making. Consider having all decisions on AIDS cases made centrally, either by the Human Resources Department or some other high-level policy-maker; make sure all supervisors and managers know they are to refer such cases immediately, rather than assuming responsibility for decision-making.B. Policy Communication To Employees. Consider advising employees about the company's general attitude toward treatment of AIDS victims, i.e., that based on current medical evidence indicating that the disease is not spread by casual contact, the normal policy will be to

employ those with the disease, or suspected of having the disease, as long as they are able to perform their jobs. Consider advising that some exceptions may be made for certain positions.

Informing employees of corporate policy before any actual "incident" occurs allows employer to declare as part of any communication that "the company knows of no employee who has AIDS." Such a statement will permit employees to consider the policy in the calmest circumstances.

The "Social Issues Commentary," in Business Week, Nov. 25, 1985, declared: "Most companies, however, have yet to come to grips with AIDS. But with cases expected to double in a year, no responsible employer can continue to duck the issue. The peace of mind of future AIDS patients and the stability of a company's work force depend on setting a fair policy without delay."

- C. Education And Training. Consider training supervisors and/or educating employees about the disease, whether in the form of handouts, live or videotaped presentations, or films. Consider whether the program should be given across the board in advance of an actual "incident" or reserved for "problem situations."

If an employer opts to announce a general policy of employing an AIDS patient, strong consideration should be given to prompt training and education efforts. These efforts can identify and address employee concerns at the earliest possible date. Employees should be told at least three basic facts:

1. AIDS cannot be transmitted casually; it cannot be transmitted at work.
2. AIDS is spread by sexual contact and abuse of IV drugs.
3. AIDS patients should not be restricted in the workplace.

- D. Changing Scientific Evidence: Keep current on medical developments and be prepared to alter the policy as medical understanding changes. Consider advising employees of the Company's intent to do so, and to bear their health and safety in mind at all times.

- E. Accommodations Options. Identify job positions for which absence of the disease may possibly be a bona fide occupational qualification, and consider the accommodation options available. These may include transfer, work at home, special hygienic precautions, rearranging work areas or schedules, part-time work, or leaves of absences.
- F. Testing. If testing is performed, exceptional procedural precautions should be taken to ensure accuracy and confidentiality.
- G. Benefits. Make contact with group health, disability and life insurers to determine their positions on coverages.

XXIII. PRACTICAL SUGGESTIONS FOR COMMON WORKPLACE SITUATIONS*

- A. Employee Self-Identifies Himself Or Herself To Supervisor As AIDS Patient.
 - 1. Determine if employee wishes to keep information confidential; explain advantages and disadvantages of being candid with co-workers. Take special precaution to assure confidentiality if employee does not wish to inform co-workers.
 - 2. Offer support and encouragement; explore ways to accommodate employee; address financial concerns of employee; explore treatment options and benefits available.
 - 3. Offer information on community resources.

*/ Much of the material in this section is adapted from AIDS In The Workplace Manual, 1986, Business Leadership Task Force of the Bay Area.

4. Exhibit sensitivity to AIDS patient's unique emotional and psychological needs: the stress of a devastating illness and imminent death; fear of loss of financial independence; fear of loss of social support from family and friends.

B. Supervisor Suspects, And Rumors Abound, That An Employee Recently In Poor Health Has AIDS.

1. Approach employee and explain existence and nature of rumors and ask how to respond.
2. Emphahsize that anything employee says will be held in strictest confidence.
3. Explain opportunity for accommodation if needed.

C. Co-workers Refuse To Work With AIDS Patient.

1. Arange for work group meeting with outside medical expert to discuss fact that AIDS cannot be casually transmitted.
2. Inform coworkers of ethical, moral and legal principles behind company's policy.
3. Encourage informal discussions between coworkers and AIDS patient.
4. Distribute literature on AIDS.
5. Demonstrate support for the AIDS patient without alienating coworkers.
6. Remind employees of company policy on transfers.
7. Consider asking for volunteers to work with AIDS patient.

8. As matter of last resort, consider replacement or possible disciplinary action, but only after obtaining legal advice.

XXIV. CONTROLLING BENEFITS COSTS ATTRIBUTABLE TO AIDS

A. Costs

1. Hospital: For the first 10,000 AIDS patients, costs averaged over \$147,000 per victim. Each person averaged approximately 168 days in the hospital at an average cost of \$828 per day.
2. Non-Hospital: Costs have not been estimated for short-term and long term disability benefits, group life insurance, home medical care, out-patient care, out-patient medication and laboratory testing, and psychiatric counseling. In many cases, these additional costs are significant.

B. Possibility Of Exclusion Of AIDS From Insurance Coverage

1. Evidence Of Insurability: Group policies utilized by almost all employers require no evidence of insurability except in very limited circumstances:
 - a. Late Entrants: Employees who declined coverage when first eligible and later seek to be covered.
 - b. Resolicitation: Employees who declined coverage when first eligible and later seek to be covered during a subsequent period of "open enrollment."
 - c. Very Small Groups: Employees in a group so small that the size does not provide a sufficient spread of risk for the insurance company.

2. Pre-Exising Conditions

- a. Standard Practice: Most group policies exclude or limit benefits for an injury or sickness which was in existence during a specified period -- usually three to six months -- prior to an employee becoming insured. Pre-existing conditions are covered on the same basis as any other injury or sickness once the individual has been insured for a certain period of time.
- b. Definition Of Pre-Existing Condition: Most state insurance commissions define it as the "existence of symptoms which would ordinarily cause a prudent person to seek diagnosis, care, or treatment."
- c. Positive HTLV-III Test Results: Would mere positive test results qualify as a pre-existing condition?

C. Case Management

- 1. Basic Approach: "combination of activities designed to ensure appropriate use of medical care facilities; improve quality of care; control or reduce costs; ensure proper referrals; provide primary care; and manage patients' episodes of care, disability and rehabilitation." A case management coordinator from the insurance company works with each individual patient's case. For example, a case management coordinator at Equitable, a pioneer in the field does the following:
 - a. Works with the attending physician to access the patient's condition and medical needs.
 - b. Contacts medical consultants, when necessary, for further evaluations and input on alternative medical possibilities.

- c. Acts as an information source for patient, family, and provider on care alternatives.
 - d. Is the liaison with specialized facilities and other providers.
 - e. Helps the family manage the patient's illness or injury.
 - f. Monitors the patient's progress throughout the entire treatment period
 - g. Reports periodically to the employer on the patient's progress, the costs of care, and savings.
2. Proven Cost Reduction: 8% to 10% reduction in costs.
3. Relationship To AIDS: Can provide less costly and more humane treatment in hospice, nursing home, or private residences.

AIDS AT WORKAPPENDIXA. Medical Information.

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2. "Transmission of AIDS" The Case against Casual Contagion," New England Journal of Medicine, Feb. 6, 1986.
3. "Special Report: AIDS, The Latest Scientific Facts," Discover, December, 1985.
4. Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, Centers for Disease Control, November 15, 1985.
5. AIDS Information Bulletin: The Public Health Service Response To AIDS, February, 1986.
6. Statement by James O. Mason, M.D., Acting Assistant Secretary For Health, U.S. Public Health Service, November 14, 1985.
7. Statement of Ann M. Hardy, Dr. P.H., Epidemiologist, AIDS Activity, Centers for Disease Control, Before the Subcommittee on Health and the Environment Committee on Energy and Commerce, U.S. House of Representatives, November 1, 1985.
8. "THE AIDS EPIDEMIC, An Overview of the Science," Issues in Science And Technology, Winter, 1986.

9. Centers for Disease Control, Morbidity and Mortality Weekly Report, June 5, 1981.
10. Centers For Disease Control, Morbidity and Mortality Weekly Report, August 30, 1985.
11. Centers For Disease Control, Morbidity and Mortality Weekly Report, April 11, 1986.

B. Legislation.

1. Los Angeles Municipal Code, Article 5.8.
2. San Francisco Municipal Ordinance, Article 38.
3. West Hollywood Ordinance No. 77u.
4. California Health and Safety Code, Chapters 1.11 and 1.12.
5. Florida Statutes, Section 381.606.
6. Wisconsin Act 73, L. 1985.
7. Hayward Ordinance (Proposed).
8. District of Columbia Bill (proposed)
9. Oakland Ordinance (proposed)
10. H.R. 3646 (proposed)
11. H.R. 3647 (proposed).

C. Legal Opinions and Decisions.

1. N.Y. Division on Human Rights, Inter-office Memorandum from General Counsel concerning "Discrimination Based on AIDS," Aug. 9, 1983.
2. N.Y. Division on Human Rights, Inter-office Memorandum from General Counsel, Jan. 30, 1985.
3. Government of the District of Columbia, letter from Office of Corporation Counsel concerning "Applicability of the D.C. Human Rights Act of 1977 to Persons with Acquired Immune Deficiency Syndrome (AIDS)," Oct. 15, 1985.
4. Florida Commission on Human Relations Investigatory Guidelines Regarding AIDS (undated).
5. LaRocca v. Dalsheim, 467 NY Supp.2d 302, 120 Misc. 697 (N.Y. Sup. Ct. 1983).
6. City of New York v. The New Saint Mark's Baths, Index No. 43640/85 (N.Y. Sup. Ct. Jan. 6, 1986.)
7. AFSMCE and State of Minnesota Department of Corrections, Case No. 85m-XVI-600-3183 (Gallagher, Dec. 10, 1985).
8. Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985).
9. Batten v. Lehman, Civil Action No. 85-4108 (D.D.C. Jan. 19, 1986).
10. Bernales v. City and County of California, Department of Public Health, State Case No. 11-1700-1 (California DIR Sept. 9, 1985).
11. Family Partner Case SF 24774, (California Unemployment Insurance Appeals Board Sept. 13, 1985).

12. Shuttleworth v. Broward County Office of Budget and Management Policy, FCHR No. 85-0624 (Florida Commission on Human Relations Dec. 11, 1985).
13. New York State Division of Human Rights, AIDS BASED DISCRIMINATION, A Summary of Reported Instances September 1983-October 1985, Nov. 8, 1985.
14. People of State of N.Y. v. 49 West 12 Tenants Corp., No. 43604/1983 (N.Y. Cty. Sup. Ct. Oct. 14, 1983, Dec. 2, 1983, Jan. 17, 1984).
15. District 27 Community School Bd. v. Bd. of Ed. of City of N.Y., No. 14940/1985 (Queens Cty. Sup. Ct. Feb. 11, 1986).
16. AIDS Policy of the Massachusetts Commission Against Discrimination.

D. Information Brochures And General Policy Guidelines And Recommendations.

1. "The Facts About Aids," National Restaurant Association, Dec. 1985.
2. AFSCME Fact Sheet on Acquired Immune Deficiency Syndrome (Undated).
3. Management of HTLV-III/LAV Infection in the Hospital, Recommendations of the American Hospital Association Advisory Committee on Infections within Hospitals (January, 1986).
4. Recommended Guidelines for Dealing With AIDS in the Schools, National Education Association Board of Directors, Oct. 4, 1985.
5. Use of CDC Guidelines for Care of AIDS Patients, American Nurses Association, Nov. 14, 1985.

6. Acquired Immune Deficiency Syndrome, 100 Questions & Answers, New York State Department of Health, January 1, 1986.
7. "AIDS," New York City Department of Health, July, 1985.
8. "Women and AIDS," San Francisco AIDS Foundation, 1984.
9. "AIDS Lifeline," San Francisco AIDS Foundation, September, 1985.
10. "Facts About AIDS," Public Health Service, Winter 1986.
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13. "AIDS Medical Guide," San Francisco AIDS Foundation (Undated).
14. "AIDS In Prisons and Jails: Issues and Options," U.S. Department of Justice, February, 1986.
15. "Facts About AIDS for Dental Professionals," Council on Dental Therapeutics, American Dental Association, October, 1985.
16. "General Statement on Institutional Response to AIDS," American College Health Association, December 2, 1985.
17. "AIDS on Campus," American Council on Education (Undated).

18. "School Admission for Acquired Immune Deficiency Syndrome (AIDS) Patients," North Dakota State Department of Health, October 18, 1985.
19. "Employees With Chronic Communicable Diseases," Fargo Public Schools, December 10, 1985.
20. "Enrollment of Children With Chronic Communicable Diseases," Fargo Public Schools, November 12, 1985.
21. "Facts About AIDS And The Public Schools," New Jersey State Department of Education (Undated).
22. "NJSDH Recommendations On The Admissibility of School Age Children With AIDS/ARC or HTLV-III Antibody," New Jersey Department of Health, August 30, 1985.

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1. "AIDS: Employer's Rights, Responsibilities and Opportunities," Washington Business Group on Health, February, 1986.
2. "Getting Involved: Employers as Case Managers," Business and Health, July/August 1985.
3. Levi Strauss
4. Bank of America
5. Anonymous Corporate Policies
6. Rehabilitation Medical Case Management, Equitable Life Insurance Society of the United States (undated).

F. Other

1. "Worry About Survival of Society First; Then AIDS Victims' Rights," Richard Restak, Washington Post, September 8, 1985.
2. Catalogue of Educational Materials, San Francisco AIDS Foundation, March 1986.

ALCOHOL AND DRUGS IN THE WORKPLACE

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ALCOHOL AND DRUGS IN THE WORKPLACE7. DRUGS AND ALCOHOL: THE SCOPE OF THE PROBLEMA. Substance Abuse Costs Employers Billions

1. Three times more absenteeism
2. Twice as many absences over 8 days
3. Five times more workers' compensation claims
4. Three and one half times more accidents
5. Three times average sickness/insurance benefits
6. Lost productivity
7. Employee theft

B. Substance Abusers Expose Employers to Additional Liabilities1. Liability for Negligent Hiring

Many states place a duty on employers to use reasonable care in the selection (and retention) of employees. See Colwell v. Oatman, 510 P.2d 454 (1973) (an employer found to have breached duty when it hired an intoxicated laborer who could not physically perform the work and injured another employee).

Note: Riley v. Tokola Offshore, Inc., ___ F. Supp. ___ (C.D. Cal. 1985), reported in Daily Labor Report, No. 242 (December 17, 1985): Employer's third-party complaint against union for negligent referral of medically unfit worker dismissed for failure to state a cause of action.

-- Vanderhule v. Berinstein, 385 App. Div. 290, 136 N.Y.S. 2d 95 (1954):
Employer may have duty to investigate once erratic behavior demonstrated).

2. Liability for Negligent Supervision.

Otis Engineering Corp. v. Clark, 668 S.W.2d 307 (1983): Supervisor escorted an intoxicated employee to his car and accepted his assurances that he could make it home safely. Employee had auto accident, killing himself and several others. Plaintiffs held to have stated cause of action against employer for negligent supervision.

But compare:

Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69 (1968) (Plaintiffs state cause of action against employer whose employee injured them in car accident. Employee intoxicated from office Christmas party).

Meany v. Newel, ____ Minn. ____, 367 N.W.2d 472 (1985) (no cause of action on same facts).

3. Increased Workers' Compensation Liability

Employees are beginning to claim that job stress has caused them to become substance abusers or has aggravated an existing condition. Cf. Poskus v. Pennsylvania, [1982] CCH W.C. Rptr. at ¶ 7039.035 (distillery worker); California Microwave, Inc. v. Workers Compensation Appeals Board, 45 Cal. Comp. Cases 125 (1980).

II. METHODS OF OBTAINING INFORMATION REGARDING
SUBSTANCE ABUSE OF APPLICANTS AND
EMPLOYEES

- A. Pre-employment medical screening
- B. Medical screening of existing employees
- C. Questionnaires, application forms, reference checks

- D. Observations of supervisors and managers
- E. Polygraphs
- F. Searches (person, lockers, personal effects, etc.), including use of drug-detection dogs
- G. Undercover investigations or surveillance

III. TESTING METHODS -- ADVANTAGES AND DISADVANTAGES

A. Alcohol Tests

1. Alcohol intoxication most commonly is measured according to "Blood Alcohol Concentration" (BAC) and is expressed as a percentage. For example, a result of .20 means that alcohol constitutes two-tenths of a percent of the blood serum in the sample. Blood, urine and breath samples are all capable of giving rise to such measurement. The BAC increases with the number of drinks consumed, but a person's weight also will affect the BAC. The heavier the person, the more drinks are required to produce the same BAC.
2. For this and other reasons, there is no absolute point which can be identified as an "intoxication" level. Thus, even though most Motor Vehicle Codes uses a BAC level of .10 as the "legal intoxication" level for driving purposes, concentrations as low as .05 are deemed relevant in determining whether a person is intoxicated. The simplest and most enforceable employer rule may be one prohibiting "use" defined as a certain BAC level.

B. Drug Tests

1. EMIT Test
 - a. Most widely used, easiest to administer and least expensive (between \$5-25). Generally, urine samples are taken.
 - b. Tests only for the presence of drug metabolites but not drug concentrations or recency of ingestion. Can identify correct drug group, but not necessarily the specific substance that was used.

- c. Yields high degree of "false positive" results, although good at eliminating false negatives.
- d. Marijuana traces may be evident after as much as three or four weeks, for a regular smoker. Moreover, a person may show traces of the appropriate metabolites simply from having been in close proximity to someone who was smoking.
- e. Test should be conducted well within 48 hours, since most metabolites pass through system between 48th and 72nd hour after ingestion.

2. Gas Chromatography/Mass Spectrometry

- a. Much more accurate than EMIT, but also much more expensive (\$50-\$100).
- b. Will identify the specific substance used much more accurately and identify whether drug present in sufficient quantity to register "positive." Best used as confirmatory test when EMIT yields a positive result.
- c. Still does not tell in what concentrations drug can be found in person's system or when ingestion occurred. Need blood sample for that. Key disadvantages of taking blood samples are that it involves a more intrusive procedure to obtain specimen, and blood metabolizes the substance much more quickly than does urine.

C. Procedural Considerations

- 1. Different labs use different "cutoff" levels in reporting whether given results are "positive" or "negative."
- 2. It is thus important to use a reputable lab to begin with, use the same lab for all testing, and to decide ahead of time what the cutoff levels will be.
- 3. Consent forms are highly recommended, should contain a release to permit employer to see test results.

4. The employee should also be asked, prior to testing, to list all drugs taken in the past thirty days and to give a brief description of the circumstances, e.g., prescription.
5. To minimize both potential tort liability and proof problems, strict safeguards to maintain the chain of custody are essential.
6. Double samples should be taken from each individual to allow re-testing on the same sample if there is an error, or if the results are "positive." It does little good to take a second sample at a later date, when the employee may now be "clean".
7. Employees should have some post-testing opportunity to explain "positive" results and to challenge the test results.

D. Pre-Employment Screening v. Screening of Existing Employees

1. Public employers may be prohibited from doing across-the-board pre-employment screening, at least in case of employees not in security-sensitive jobs. Fourth Amendment restrictions apply. See infra.
2. Private employers have much more leeway in this regard.
 - a. No absolute federal or state statutory or common law prohibitions against pre-employment drug tests, though some discrimination statutes require tests be job-related.
 - b. Note also recent San Francisco ordinance, which prohibits
 - (1) Random or company-wide drug testing by public and private employers; and
 - (2) Any blood, urine or encephalographic testing absent reasonable grounds to believe employee's faculties are impaired to the point of posing a clear and present danger to himself or others.
3. On-the-job random testing of public employees prohibited altogether in all but the most extreme circumstances. But see Shoemaker v. Handel, infra.

4. On-the-job random testing of private sector employees not expressly prohibited (except in San Francisco) but inadvisable because of privacy, just cause, and other considerations.

IV. RELATED CONSTITUTIONAL AND TORT CONSIDERATIONS

A. Constitutional Issues

1. Fourth Amendment issues generally are implicated in connection with drug/alcohol testing and searches or surveillance of employees.
2. Of course, U.S. Constitution only reaches state action, but private employers can be implicated if, for example, acting in concert with a law enforcement agency. See U.S. v. McGreevy, 652 F.2d 849 (9th Cir. 1981).
3. State constitutions may also specifically protect privacy interests and may also reach actions of private employers. At least seven states -- Alaska, Arizona, California, Florida, Massachusetts, Montana, and Rhode Island -- have express privacy guarantees in their constitutions. In Illinois, privacy prescriptions in Constitution apply only to government action. See Barr v. Kelso-Burnett, 106 Ill. 2d 520 (1985).
4. In any event, Fourth Amendment standards apply directly to public employers and may also apply to certain government contractors.
5. Expectations of Privacy -- Testing/Searches

To date, drug and alcohol testing programs of public employers generally are permitted, particularly in the law enforcement agencies, but courts often severely limit the conditions under which testing may be required. Employers must use reasonable procedures, protect employees' due process rights, have good policy reasons for implementing a program (e.g., safety), and have some "reasonable cause" for imposing the test on the employee in question.

- a. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976): The Court upheld a policy

requiring city bus drivers to submit to blood and urine tests when they were involved in any serious accident, or suspected of being intoxicated or under the influence of narcotics. The paramount interest in public safety deprived bus drivers of any reasonable expectation of privacy with regard to submitting to blood and urine tests. Moreover, the limited circumstances in which the tests were given, and the manner of taking samples, were deemed reasonable.

- b. McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985): Iowa prison guards attacked the constitutionality of an Iowa Department of Corrections program providing for strip searches, blood testing, urinalysis and vehicle searches, whenever a supervisor wished. Initially, the program's implementation was enjoined, and the Eighth Circuit sustained the injunction (see 746 F.2d 785 (8th Cir. 1984)). Last summer, after additional hearings, the District Court issued another decision, which significantly limited the circumstances under which compulsory testing can occur. The upshot of that decision is that (i) applicants for jobs may be subjected to testing; (ii) yearly physicals can include a urinalysis component; (iii) employees, once hired, can be compelled to submit to drug testing only when supervisors can establish from objective facts that an employee is then under the influence of drugs or alcohol; (iv) automobile searches are permissible only when inmates have access to the vehicles, and (v) strip searches are only permitted when there is an objective suspicion the employee is carrying weapons or illicit drugs. Accord Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187, 203 (2d Cir. 1984); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (Upheld mandatory urinalysis of city employees suspected of drug use -- safety rationale. No warrant required).

- c. Turner v. Fraternal Order of Police, 120 L.R.R.M. 3294 (D.C. Cir. 1985): Upheld a testing program for D.C. policemen which provided for testing where supervisors suspected drug use and "at the discretion" of the police board. Nevertheless, the Court did not allow carte blanche testing "at the discretion" of the police board or supervisors. Rather, it apparently held that there must be "a reasonable, objective basis for medical investigation" which relates "to the police officer's fitness for duty before testing can occur."
- d. Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985): Upheld a rule by the New Jersey Racing Commission requiring jockeys to submit to urine and breathalyzer tests, including random testing. The Court based its decision on the prevailing public interest in the safety and integrity of the horse-racing industry. Represents the most far-reaching decision to date, given the rather tenuous nexus between horse-racing and public safety and the permitted use of random testing.

7. Other "Searches and Seizures"

- a. Searches of lockers and personal effects have been upheld as reasonable where employer previously had reserved access to them by, e.g., supplying locks, giving prior notice, or conducting previous searches. U.S. v. Donato, D.C., 269 F. Supp. 921, aff'd, 379 F.2d 288 (3d Cir. 1967); Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972), aff'd, 484 F.2d 1196 (9th Cir. 1973); U.S. v. Bunkers, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989 (1985). Compare U.S. v. Speights, 557 F.2d 362 (3d Cir. 1977).
- b. Garrett v. Los Angeles City Unified School District, 116 Cal. App. 3d 520 (1981): Rejected an employee's claim that a chest x-ray for tuberculosis, required as a condition of employment, violated her state constitutional right to privacy. The court was persuaded by expert medical testimony that mandatory chest x-rays were

the best means of guarding against the actual health threat of tuberculosis spreading to other staff and students.

- c. National Organization for Reform of Marijuana Laws v. Gain, 100 Cal. App. 3d 586 (1979): Held, California's constitutional right to privacy does not protect an individuals' right to possess or use marijuana at home. Accordingly, employees' constitutional right to privacy would not conflict with an employer's rule prohibiting unlawful drugs at work.
- d. But compare: Rulon-Miller v. IBM, infra.
- e. Compare also: Searches of employer's own property.

8. Freedom of Expression/Religion

Objections to testing might also be raised by some employees on religious grounds. See, e.g., St. Mary's Hospital v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985) (individual refusing to undergo blood transfusion on religious grounds had "constitutional" right to privacy). But cf. Gargiul v. Tompkins, 525 F. Supp. 795 (N.D.N.Y. 1981) (no constitutional right of privacy protects female's refusal to take medical examination because physician was male).

B. Tort Issues

1. Invasion of Privacy

- a. Although at least the federal Constitution does not directly protect private sector employees, the same principles increasingly form the basis of tort causes of action. K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984), writ refused, 686 S.W.2d 593 (1985): Held that an employee who, inter alia, used his own lock on a locker had a reasonable expectation of privacy in his locker. Accordingly, a search not based on any reasonable grounds violated his right to privacy.

- b. Senior v. Wometco Enterprises, Inc., Slip Op., Case No. 87-2724 (S.D. Fla. 1984): Jury found a manager's privacy had been violated when his personal files had been reviewed and confiscated from his office without his permission.
1. Note that the Supreme Court has recognized some right of privacy of private sector employees in the contents of their personnel files. Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).
 2. See also Johns-Manville Sales Corp., 252 N.L.R.B. 368 (1980); New Jersey Bell Telephone Co. v. NLRB, 270 F.2d 789 (3d Cir. 1983).
- d. Privacy considerations may also reach conduct outside the workplace. See Rulon-Miller v. IBM, 117 L.R.R.M. 3309 (Colo. 1984): Employee terminated for maintaining romantic relationship with former IBM employee now working for competitor. Awarded \$300,000 in damages for invasion of privacy and intentional infliction of emotional distress.
- e. Requests for private information may also be prohibited. But see Cort v. Bristol Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982): No right of privacy in information re, inter alia, serious illnesses, off-the-job problems, principal worries, nervous disorders, smoking and drinking habits, etc.

2. Defamation

- a. Defamation actions have been successful in at least two instances where medical reports or test results were used to spread false information about the individual, or themselves were released to persons without a "need to know."
1. Armstrong v. Morgan, 545 S.W.2d 45, 47 (Tex. App. 1976): Plaintiff stated cause of action for defamation where employer had released false medical report about employee within the corporation.

2. Houston Belt & Terminal Railway Co. v. Wherry, 548 S.W.2d 743 (Tex. App 1976), cert. denied, 434 U.S. 962 (1977): Former employee awarded \$200,000 in damages because employer falsely reported he was a drug addict based on inaccurate test results.
 - b. Compare Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985): Dictum -- no defamation where employee who suspected of being drug user was questioned and subjected to tests, which ultimately proved negative; employer permitted to conduct internal investigation.
 - c. It is critical that the results of drug and alcohol tests not be reported (orally or in writing) outside the corporation under any circumstances not explicitly required by law, and that they be severely restricted internally on some kind of "need-to-know" basis.
3. Intentional Infliction of Emotional Distress
 - a. An employer who does not give adequate notice to employees before requiring them to undergo an alcohol or drug test may be liable for intentional infliction of emotional distress.
 - b. An employer may be liable for intentional infliction of emotional distress if it conducts an unreasonable search. Employers should obtain consents and should conduct non-routine searches with all possible privacy and confidentiality.
4. Assault and Battery
 - a. Force may not be used in searching employees.
 - b. Testing may also give rise to assault claims, especially if blood is to be taken. Do not test if consent withheld.

- c. An employer can be held responsible where an intoxicated employee harms others while on duty, or even while off duty, if the acts occur on the employer's premises or are accomplished with employer's property. See Otis Engineering v. Clark, supra.
- d. An employer may also be held responsible for torts of its drug testing agent, if these result in injury. See Armstrong v. Morgan, 545 S.W.2d 45, 46-47 (Tex. App. 1976).

5. False Imprisonment

Black v. Kroger, 527 S.W.2d 794 (1975):
Employee detained several hours and threatened with jail on suspicion of theft.

6. Retaliatory Discharge

- a. May be based on public policies embodied in constitutional guarantees.
- b. May be based on policies against certain types of testing, e.g., polygraphs.

7. Negligence

- a. Negligent hiring. See p. 1, supra.
- b. Negligent supervision. See p. 1, supra. There may be a duty to reassign employee to position not jeopardizing safety of self and others, once drug/alcohol problem demonstrated.
- c. Once testing performed, employer may have a corresponding duty to disclose test results, particularly if a harmful medication condition is discovered, e.g., AIDS.
 - (1) Even if not required by common law, probably required under OSHA, at least for current employees. See 29 C.F.R. §§ 1910.10(d)(i), 1910.20(e)(2)(ii)(A) and (C)(2), and 1910.20(e)(6)(i)(B).

- (2) See also United States v. Westinghouse, 638 F.2d 570 (3d Cir. 1980) (Employer must surrender employee medical records to NIOSH).

E. Tort-Like Issues Under Benefits Statutes

1. Workers' Compensation

- a. Injuries due to job-related stress may be compensable. See p. 1, supra.
- b. Under some statutes, intoxication may be a defense to employer's workers' compensation liability. E.g., Minnesota.

2. Unemployment Compensation

- a. Eligibility for benefits sometimes turns on a "wilful misconduct" standard. Intoxication may cause "non-volitional" breach of a work rule.
- b. See generally Jacobs v. California Unemployment Insurance Appeals Board, 25 Cal. App 3d 1035 (1972) (excessive absenteeism from alcoholism held non-volitional); Jackson v. Board of Review of The Dept. of Labor, 105 Ill. 2d 501 (1985) (drinking on job is misconduct sufficient for denial of unemployment benefits, even if no actual harm to employer); Matter of Restifo, 452 N.Y.S. 2d 690 (1982) (failure to attend required drug rehabilitation program constitutes "misconduct").

V. HANDICAP DISCRIMINATION ISSUES

A. Federal Rehabilitation Act, 29 U.S.C. § 706(7)(B)

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one of more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not

include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

B. Illustrative State Statutes

Illinois Human Rights Act, ch. 68, § 1-103

(I) Handicap. "Handicap" means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic: (1) For purposes of Article 2 is unrelated to the person's ability to perform the duties of a particular job or position;

ILLINOIS: INTERPRETIVE RULES ON HANDICAP
DISCRIMINATION IN EMPLOYMENT

2500.20. What Constitutes a "Handicap?"

(a) Statutory Definition. According to Section 1-103(I) of the Act, the term "handicap" in employment contexts means a determinable physical or mental characteristic of a person, ... the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic is unrelated to the person's ability to perform the duties of a particular job or position.

(b) "Determinable Physical or Mental characteristic. The definition is not confined to only those physical and mental conditions which are grave or extreme in nature. However, it is interpreted as excluding (1) conditions which are transitory and insubstantial, and (2) conditions which are not significantly debilitating or disfiguring. To be covered, a condition must be "determinable" by recognized clinical or laboratory diagnostic techniques.

(c) "Result[ing] from Disease, Injury, Congenital Condition of Birth or Functional Disorder." If a dispute arises as to whether a condition constitutes a handicap, it is

the burden of the person claiming the handicap to establish that the condition results from disease, injury, congenital condition of birth or functional disorder. For example, the conditions of obesity and drug or alcohol abuse shall not be deemed "handicaps" unless the person can demonstrate that the condition arises from or constitutes the equivalent of a disease or functional disorder. (Even where alcohol or drug dependence is established as constituting a disease or functional disorder, see paragraph (d) of this Section regarding whether the condition is "unrelated to the person's ability.")

(d) "Unrelated to the Person's Ability to Perform." Under this language, the real or suspected implications of a person's physical or mental condition are irrelevant, and therefore cannot justify discrimination against the person, if those implications do not affect the person's ability to acceptably perform the particular job in question. Such irrelevant implications include the preferences of co-workers, clients and customers; the expense of providing fringe benefits such as group insurance; and potential workers compensation liability. Moreover, a condition is "unrelated to a person's ability to perform" if it merely affects the person's ability to perform tasks or engage in activities that are apart from or only incidental to the job in question. On the other hand, a person's condition is related to his/her ability if it would make employment of the person in the particular position demonstrably hazardous to the health or safety of the person or others, or if it is manifested or results in behavior (e.g., absenteeism, poor quality or quantity of production, or disruptiveness) which fails to meet acceptable standards. Reasonable accommodation of a person's physical or mental limitations must be explored, in accordance with Section 4 of this Article, to determine whether the condition prevents acceptable or safe performance of the activities necessary to the job. However, a person's alcoholism or drug dependence which is manifested in excessive absence or tardiness, or intoxication at work, is presumptively related to the person's ability to perform.

2500.40. Reasonable Accommodation

(a) Requirement. Employers and labor organizations must make reasonable accommodation of the known physical or mental limitations of otherwise qualified handicapped applicants or employees, unless the employer or labor organization can demonstrate that such accommodation would be prohibitively expensive or would unduly disrupt the ordinary conduct of business. Whether an accommodation would be prohibitively expensive or disruptive will involve weighing its cost and

inconvenience against the immediate and potential benefits of providing it, where the immediate benefit is facilitation of the handicapped person's employment and the potential benefits include facilitating access by other disabled employees, applicants, clients and customers. Accommodation may include: alteration of the facility or work site; modification of work schedules or leave policy; acquisition of equipment; job restructuring; provision of readers or interpreters; and other similar actions.

2500.60. Pre-Employment Inquiries and Examinations

(a) Inquiries. An employer, employment agency or labor organization may not require a job applicant to list or disclose all disabling conditions with which the applicant is afflicted. However, it is not a violation of the Act for an employer, employment agency or labor organization to require uniformly of all applicants for employment, referral or admission to an apprenticeship or other training program, whether they have physical or mental handicaps which may impair their abilities to acceptably perform in the positions applied for, or to successfully complete the apprenticeship or training programs to which admission is sought.

(b) Examinations. An employer, employment agency or labor organization may require all applicants who have been found otherwise qualified for selection to submit to pre-employment physical or psychological examinations, for the purpose of determining whether such applicants are capable of acceptably performing the activities necessary to the job or training at issue. Such examinations may also be utilized to ascertain the nature of any accommodation which may be needed to enable the applicant to perform acceptably, but not to disqualify applicants who are revealed as having a condition or characteristic which merely presents a risk of future injury. Pre-Employment physical or psychological examinations may be conducted prior to the stage at which applicants are evaluated as otherwise fully qualified if the practice is followed consistently with all applicants and if it can be demonstrated that each subsequent evaluative procedure is more expensive or burdensome than the physical or psychological examination. In all events, however, the results of any such pre-employment examination must be made available to the applicant, upon request.

Michigan Comp. Laws Ann. § 500.3425(1)(1983)

Each insurer offering health insurance policies in this state shall provide coverage for intermediate and outpatient

care for substance abuse, upon issuance or renewal, in all contracts for, group and individual hospital, medical, surgical expense-incurred health insurances policies other than limited classification policies.

C. Pertinent Handicap Decisions

Richardson v. U.S. Postal Service, 613 F. Supp. 1213 (D.D.C. 1985)

Postal Service did have not duty to accommodate alcoholic discharged for off-duty attempt (related to alcoholism) to kill self and wife.

McLeod v. City of Detroit, 39 FEP 225 (E.D. Mich. 1985)

Firefighter-applicants who were rejected after failing urinalysis not qualified handicapped individuals because:

1. disqualification from particular job with particular employee insufficient to show impairment of "major life activity";
2. even if firefighters had shown "handicapped" because use of marijuana can adversely affect ability to perform, test was "job-related";
3. evidence that marijuana causes short-term memory loss, problems with thought, coordination and diminished ability to take risks is proof that use constitutes "direct threat to property and safety of community."

Robinson v. Devine, 37 FEP 728 (D.D.C. 1985)

1. Rehab. Act requires accommodation of alcoholic with "average" job performance.
2. Repeated instances of on-the-job intoxication rendered alcoholic unqualified.
3. Duty to accommodate did not require "another chance" where agency had allowed use of advance sick leave and repeatedly offered counseling.

Biltz v. Northwest Airlines, Inc., 37 FEP 171 (Minn. Ct. of App. 1985)

Airline which discharged pilot after diagnosis of alcoholism did not violate Human Rights Act. Where pilot denied was alcoholic and refused treatment, had lost FAA medical certificate, and where airline had allowed other alcoholic pilots to go on unpaid personal leave for treatment, airline properly discharged for lack of a BFOQ.

Healy v. Bergman, 37 FEP 1589 (D. Mass. 1985)

Alcoholic fireman discharged after second self-admission to multi-week detox program in two month period. Court remands to OFCCP, suggesting that OFCCP acted arbitrarily and capriciously in concluding that employee's alcohol abuse related absences prevented him from performing job.

Puff v. Israel, 35 FEP 253 (M.D. Ga. 1985)

Claims of plaintiff (City Compliance Officer responsible for enforcing laws), who was discharged after third DUI conviction, under Section 504 of Rehabilitation Act, rejected. Court holds plaintiff's contention that discharge for convictions is same thing as discharge for alcoholism, is "patently without merit."

Northwest Airlines v. Gomez-Bethke, 34 FEP 837 (D. Minn. 1984)

Minnesota DHR's efforts to regulate airlines policies regarding use of vacation, sick leave, medical leave by chemically dependent employees/pilots preempted by ERISA and Federal Aviation Act.

Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984)

1. If federal employee's performance deficiencies are suspected to be caused by alcohol, agency must offer counseling. If employee refuses, agency must offer "firm choice" between treatment and discipline.
2. Agency may not automatically terminate backsliders after treatment but should discipline short of discharge. Before termination, agency must determine whether retention constitutes "undue hardship."
3. If removal is only feasible option, agency must formally evaluate whether condition caused poor performance; if so, agency must counsel and offer leave without pay.

Ernst v. Indiana Bell Tel. Co., 32 FEP 1859 (7th Cir. 1983)

Under Simpson, no private cause of action under Section 503(a) of the Rehabilitation Act.

Coleman v. Ill. Bell Tel. Co., 10 Ill. HRC Reg. 2 (1983)

1. Alcoholism is protected handicap.
2. Where complainant admitted drinking pint a day, admitted there was connection between drinking and attendance/performance problems on job, complainant had failed to show drinking unrelated to job performance and had failed to show she was "handicapped" under Act.

Simpson v. Reynolds Metals, 629 F.2d 1226 (7th Cir. 1980)

Chronic alcoholic, discharged for related attendance problems, brings action under 503, 504 and Illinois Constitution. Section 503 count dismissed because no private right of action. Section 504 count dismissed on standing grounds; plaintiff did not show nexus between discharge and program receiving federal assistance funds. Because no federal jurisdiction, Seventh Circuit declines to consider state claim.

Hubbard v. UPI, 31 FEP 139 (Minn. Sup. Ct. 1983)

Discharged, award-winning alcoholic photographer files two count complaint: intentional infliction and handicap discrimination. Later adds retaliatory discharge count. After 5 week trial, jury awards over \$150,000 in P&C damages on distress count and finds handicap discrimination; trial court finds retaliation and orders reinstatement, Minnesota Supreme Court reverses on all three counts:

1. Discipline and adverse ratings neither extreme nor outrageous and insufficient evidence of severe mental distress.
2. Assuming alcoholism is covered disability, UPI sufficiently articulated legitimate reason for discharge: inadequate performance. (Documents all focused on performance; other UPI alcoholics criticize plaintiff's performance.)
3. No retaliatory discharge because decision to terminate predated handicap charge.

Doyle v. Univ. of Alabama, 29 FEP 777 (11th Cir. 1983)

Discharged alcoholic's claims under Section 504 dismissed on ground not employed in program receiving federal assistance.

Squires v. LIRC, 30 FEP 398 (Wis. Ct. of App., 1980)

While alcoholism protected, employer properly discharged employee for on-the-job intoxication/inability to perform. Under Section 111.34(f)(f), employer may discharge handicapped person who is "unable to efficiently perform, at the standards set by the employer, the duties required."

Athanas v. Bd. of Educ. of School Dist. 111, 28 FEP 569 (N.D. Ill. 1980)

Discharged alcoholic teacher brings Rehabilitation Act counts, Section 1983 due process claim and pendant claims against school officials. Judge Hoffman holds:

1. Single incident -- you smell of booze, take blood test -- not actionable under Rehabilitation Act or 1983 (associated pendant claims dismissed).
2. Claims of post-diagnosis harassment state cause of action.
3. Claims of dismissal without hearing, state cause of action under Illinois and federal law.
4. Complaint's admissions that plaintiff was hospitalized for alcoholism insufficient to establish unqualified.
5. There is private right of action under 504; no necessity to exhaust admin. remedies.
6. Art. 1, Section 19 of Illinois Constitution (which forbids handicap discrimination in hiring and promotion) also applies to dismissals.

EEOC Decision 80-13, 26 FEP 1795 (1980)

Employer lawfully refused to hire black Methadone user for safety-sensitive position. Such a policy justified by business necessity, notwithstanding possible adverse impact.

N.Y.C. Transit Authority v. Beazer, 19 FEP 149 (U.S. 1979)

1. Regardless of disparate impact against blacks and hispanics, transit authority's policy of not hiring methadone users (and users of other narcotic drugs) is job-related and legal under Title VII.
2. Legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of all methadone users.
3. While it may be unwise from a personnel standpoint to have broader than necessary rule against employment of methadone users, that does not mean rule violates Equal Protection clause.
4. Court refused to reach issues under Rehabilitation Act on ground that Act had not been in effect when lower courts ruled.

Perez v. Appeal Board, 37 FEP 1407 (N.Y. Sup. Ct., App. Div., 1979)

Methodone user denied civil service elevator operator job/building guard job. Court remands to agency criticizing its dismissal of complaint on ground drug dependence is social problem, not a physical disability.

McGarvey v. D.C., 29 FEP 954 (D.D.C. 1979)

District did not violate Rehabilitation Act when it refused to hire felon convicted of drug offenses for ambulance technician job (in part because it considered surrounding circumstances).

Whitaker v. Bd. of Higher Educ., 18 FEP 906 (E.D.N.Y. 1978)

Alcoholic professor may maintain private action under § 504; need not exhaust admin. remedies because HEW regulations do not provide meaningful remedy.

Davis v. Bucher, 17 FEP 918 (E.D. Pa. 1978)

Applicants with history of past drug abuse protected under Rehab. Act and may maintain private actions. City's refusal to hire former addicts solely because of past use violates due

process and equal protection clauses (policy overbroad, irrational, has no relationship to qualifications for work or job performance).

VI. ARBITRATION OF ALCOHOL/DRUG CASES

A. JUST CAUSE CHECKLIST

1. Proper notice?
2. Reasonable rule?
3. Proper investigation?
4. Sufficient proof?
5. Equal treatment?
6. Proper penalty?

B. NOTICE: Was Employee Warned of Consequences?

1. Do rules prohibit intoxication?
use?
possession?
reporting to work under influence?
2. How are drugs defined?
 - a. narcotics narrow term, be expansive
 - b. abuse of prescription drugs common and dangerous.
3. Notice problems more acute with respect to off-duty/off-premises misconduct.
4. Notice of obligation to submit to testing/cooperate in investigation.
5. Has notice of likely discipline also been given?

C. REASONABLE RULES: Is Company rule reasonably related to operational needs and legitimate expectations of employer?

1. Generally, reasonableness is not major issue, but there are a number of exceptions.

2. Innocent possession

-- beer in back of station wagon for weekend party
(68-2 ARB ¶ 8773)

-- "empties" from night before (56 LA 856)

3. On Premises, Off-the-Clock (look for
misconduct-related just cause)

4. Off-Premises Consumption: Generally, can't
discharge except:

- a. where leads to reporting under influence (most
common)
- b. results in absence or on-premises misconduct
(a.g., 80 LA 503, drunk breaks plant windows)
- c. company vehicle/equipment in custody (a.g., 62
LA 1227; 76-2 ARB ¶ 8493)
- d. truck/bus drivers; on-call employees
- e. company rules prohibit consumption during or
preceding breaks (and company can demonstrate
special need for rule (52 LA 1279
- f. substantial damage to employer's reputation
(uniformed employees, drug counselors,
Greyhound drivers, airline pilots)
- g. employee previously reinstated on condition
stays clean.

D. INVESTIGATION: Was a timely, thorough and fair
investigation conducted?

1. Often critical in drug/alcohol cases because of
proof problems.
2. Have all potential witnesses been questioned?
3. Has all relevant physical and documentary evidence
been collected?
4. Generally, arbitrators don't require blood alcohol
tests. Arbitrators usually hold supervisors can
observe and recognize intoxication. In drug area,
supervisors should have special training.

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5. Consider conducting blood or urine test if employee
 - a. requests testing (79-2 ARB ¶ 8738; 77-2 ARB ¶ 8598)
 - b. raises medication, illness, fumes defenses, or
 - c. if direct evidence weak.
 6. What if employee refuses test?
 - a. cf. Weingarten issue
 - b. get employee to state reasons
 - c. cover ahead of time in policy (which allows discipline for non-cooperation, insubordination)
 - d. argue adverse inference and that refusal to cooperate precludes award of back pay.
 7. Search & Seizure Issues
 - a. constitutional protections should not apply to private sector employers (but arbitrators do use)
 - b. arm of state; police cooperation cases
 - c. even if constitution doesn't apply, arbitrators invoke industrial due process (justification for search and rule, opportunity to defend).
 8. Investigation Must be Timely
 - a. don't let supervisors go to lunch
 - b. physiological symptoms disappear
 - c. delay inconsistent with arguments that rule violations are serious
 - d. delay allows employee to allege denied opportunity to defend.
 9. Investigation Must be Fair

judge/jury problem (69 LA 811)

E. SUFFICIENT PROOF

1. Necessary quantum of proof:

- a. beyond a reasonable doubt (stigma, misconduct of criminal nature, industrial capital punishment)
- b. clear and convincing
- c. preponderance of evidence
- d. reasonable basis for exercise of managerial discretion.

2. Proof of Intoxication/Impairment

- a. evidence is usually direct (observations of one or more supervisors)
- b. typical problems:
 - single symptom
 - key symptom missing
 - delayed reaction (suggests supervisor perceived sobriety)
 - no "opportunity"
 - [Is it likely grievant could smoke or drink unseen? Could he have snuck off? Where's the physical evidence?]
 - incredible testimony (conflicting, vague, etc.)
 - hearsay testimony (if at all possible, have observers testify).
- c. Medication/Illness/Fumes Defense
 - If medication claimed:
 - verify prescription with doctor
 - determine if medicine produces symptoms
 - determine if employee has acted similarly over course of medication/illness

- determine if there's other evidence of underlying illness
- don't forget employee may be using drug/ alcohol and taking medicine
- draft rules to require disclosure and punish nondisclosure of medications which impair performance

If illness claimed:

- determine whether/when doctor seen
- ask medical professional if employee claim reasonable
- determine whether medication taken
- determine whether employee lost time or told others sick
- make employee substantiate claims

If fumes claimed:

- determine whether other employees similarly affected
- check with industrial medicine department/ other experts
- ask employee to prove special sensitivity

d. Consider Blood Testing If

- direct evidence weak
- "opportunity" problem exists
- credibility conflicts
- nothing but hearsay
- believe employee can't justify refusal

3. Proof of Use (Drinking/Smoking)

a. Direct Evidence

- clear view

- be certain of what observed/identity
- be certain substance consumed was drug or alcohol
- find corroborating evidence -- conduct thorough investigation

b. Circumstantial Evidence

- make sure evidence is solid
- ask if evidence eliminates other explanations and is convincing
- where's the container/substance?
- is evidence fresh (cold, wet can or room temperature & dry)?
- can you tie grievant to area where evidence found?
- can you establish opportunity?
- can witness testify grievant showed signs of consumption?

- 4. Proof of Possession
 - prove whose it was
 - prove what it was
 - eliminate innocent possession

F. EQUAL TREATMENT?

- 1. Have rules been enforced inconsistently or ignored in past?
- 2. Do other employees get away with similar conduct, e.g., lunchtime drinking by management, salesmen?
- 3. Has notice of crackdown been given?
- 4. Has company ignored evidence of problem (1000 beer cans in trash every week)?
- 5. Is severity of discipline consistent with other cases?
- 6. The chronic alcoholic:

Notwithstanding equal treatment test, arbitrators will likely require special treatment for chronic alcoholics. Same tendency not discernible for drug users.

G. IS THE PENALTY PROPER?

1. Generally, intoxication regarded as more serious than use, which is worse than possession.
2. Difficult to make discharge for first possession offense stick.
3. Cf. Notice and Practice (i.e., with clear rules and consistent practice, company can make "draconian" penalties stick.)
4. Is additional misconduct present or absent?
5. Any safety factor present?
6. What's Past record?
7. Length of service.
8. Rehabilitation for chronic alcoholic
How many chances?

Sources: Alcohol-Related Misconduct
Koven & Smith (Kendall-Hunt)

Alcohol & Drugs, Denenberg & Denenberg (BNA)

VII. EMPLOYER DRUG AND ALCOHOL ABUSE POLICIES: CHECKLIST

1. Before implementing any policy, the employer must make some initial policy decisions regarding which employees (including managers and supervisors) are to be subject to the policy, what penalties are appropriate for particular types of offenses (these may vary from one employee group to another), how much the employer itself may wish to get involved in the rehabilitation business, et cetera.
2. Any policy should be clearly stated, should inform employees of the penalties for violation of the rules, should outline the conditions under which screening will be performed, and how the results will be used.
3. A policy covering existing employees should not refer to applicants, but applicants should be individually advised that they will be subject to a medical examination which includes drug and alcohol screening. In fact, by specifically advising applicants that they will be drug-screened, those with an addiction problem may self-select themselves out, i.e., will not show up for the test.

- 3-
4. Define covered substances broadly, to include non-narcotic and prescription drugs. "Licit/illicit" distinction may be most desirable.
 5. At the very least, the policy should seek to prohibit the following conduct:
 - Use, possession and sale of illicit drugs both on and off company premises;
 - Use and possession of alcohol on company premises or company business;
 - Being under the influence of licit or illicit drugs or alcohol on company premises or company business;
 - Use of alcohol off company premises that adversely affects the individual's work performance, his own or others' safety, or the employer's regard or reputation in the community;
 - Use of licit drugs on or off the premises that adversely affects the individual's work performance, his own or others' safety, or the employer's regard or reputation in the community;

Employers can expect particular resistance from any unions with whom they deal regarding attempted regulation of off-duty conduct. Here, however, the proposed rules attempt to punish only that conduct having a nexus with employment, except in the case of use of illicit drugs.

6. A "use" standard of prohibited conduct, with or without one prohibiting "intoxication" or "being under the influence" is preferable, because it is easier to enforce. "Use" may be defined as prescribed drug or alcohol levels in the body. The policy also should contain a statement to the effect that both drug and alcohol abuse are regarded as being of equal severity.
7. Supervisors should be trained to recognize appropriate symptoms, and to administer the policy intelligently.
8. The costs of all drug and alcohol screening should be borne by the employer.
9. Testing should be performed by a reputable laboratory, using qualified medical technicians or professionals. If practical, this is preferable to having the tests performed in-house. Among other reasons, it reduces the

- likelihood of a break in the chain of custody of the samples or specimens being tested.
10. If possible, all work should be performed by the same laboratory to ensure uniformity of tests and procedures.
 11. The employer and the laboratory must determine ahead of time what test levels will result in a "positive" test finding, and employees should be advised of the applicable standards.
 12. As noted, employees and applicants likewise should be advised of the circumstances under which they will be tested, a.g., following accidents, where there is objective reason to believe they may be "under the influence," during annual physicals, etc. Random searches and tests are inadvisable unless there is a compelling reason justifying their use. Public employers should not use them at all. If used by private employers, they should be limited to employees in positions posing a threat to others or to the employer. Employees subject to random searches must be put on notice ahead of time. Even these restrictions still permit unannounced searches.
 13. Consent forms should be used prior to all testing. Those who refuse to sign the form or to submit to testing should be questioned regarding the reasons for refusal, or suspended pending investigation. Unless the asserted reasons are themselves protected, a.g., religious, the refusing employees can be subjected to discipline for their refusal to cooperate. Employers can reduce their risk of liability by informing employees and their representatives about the consequences of such a refusal ahead of time and by stressing that such refusal is tantamount to insubordination. Indeed, work rules and/or union contracts may expressly state that refusal is cause for discharge, or conversely, consent to testing as a condition of employment.
 14. Applicants refusing to take the test for unprotected reasons generally should be rejected for refusal to comply with uniform hiring procedures. The policy should not state that any refusal creates a presumption of "intoxication," etc., because such presumption arguably could be deemed a discriminatory 'perceived handicap.'
 15. Prior to testing, employees should be given the opportunity to list all drugs they have taken in the last thirty days and to explain the circumstances in writing, a.g., prescriptions, nature of illness, etc. This may prove particularly helpful in assessing applicants who test positive for drugs or alcohol.

16. The employer and laboratory involved must use scrupulous procedures to maintain the chain of custody, especially if specimens are to be taken on the premises and transported elsewhere for testing. See Georgia Power procedures in handout.
17. Double samples should be taken in the first instance. Half should be preserved (usually frozen) in case re-testing is required. If the test results are positive, the employee should be asked for an explanation. If the supervisor feels the situation warrants, he/she may order testing of the second "frozen" half of the specimen, using a different test, e.g., EMIT v. gas chromatography. A further medical examination also may be appropriate at this juncture.
18. The results of the second test should take precedence and be acted upon, unless surrounding circumstances suggest that they are unreliable for some reason.
19. Of course, positive test results alone may not warrant immediate termination, particularly if the person is still performing adequately. Moreover, applicable handicap discrimination prescriptions may actually require some accommodation short of discharge. Various rehabilitation options may be offered.
20. Test results should be furnished the employee only on request. They should not be furnished to any union or other representative, or any outsider, without the express written consent of the employee. Precautions also should be taken to disseminate the results internally only on a strict need to know basis. Other questioning or investigation should be conducted as confidentially as possible.
21. Every effort should be made to document performance deficiencies regularly, including witness observations of unusual behavior or incidents of wrongdoing that prompted testing in the first instance. In unionized settings, stewards might also be called in to observe, if appropriate in the circumstances.

The task force hired Chicago consultant Peter B. Bensinger, who served as head of the federal Drug Enforcement Administration from 1976 to 1981, to help with the effort.

The task force completed its work in February and concluded that the utility industry was experiencing drug-related problems "no worse, but no better" than industry in general, Tuosto said. The general consensus, though not absolute, is that upwards of 7% of the nation's workforce is involved with the misuse of drugs, he said.

Utilities are now being encouraged by the EEL task force to develop a policy that will deal with any problems they may have.

PSE&G moved ahead with the development of its policy, even as the EEL task force was finishing its work. "The company felt the need for drug awareness was important so we got started quickly," Tuosto said. "We want to insure a safe working environment for all of our employees. The policy that has been developed is not meant to be punitive. Rather, it is designed to be preventive."

There have been some drug-related incidents in the company over the years, Tuosto said. "Ideally, it will be to everyone's benefit if there would be no more incidents here at PSE&G," he said. "Perhaps this new policy, with its provisions for drug awareness and personal help, will set us in that direction."

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4. Behavioral Observation Training for Supervisors

Supervisors are in day-to-day contact with their personnel and are most familiar with their normal behavior patterns. Therefore, they are in the best position to detect changes in employees' behavior and to initiate appropriate corrective action. Supervisors should be given clear responsibility for behavioral observation of their employees and should be given special training to ensure they have the knowledge and ability to perform that task well. Supervisory training should stress that the supervisor's job is NOT to diagnose but to refer employees to competent professionals for appropriate treatment.

The examples provided in this section reflect an outline in depth of guidelines that supervisors can refer to when evaluating an individual employee's work. Questions in the examples relate to efficiency, errors, absenteeism, cooperation, social interaction,

mood changes, personal health and hygiene, changes in behavior, the feelings that supervisors may have about the individual employee, and the need for clear documentation. Guidelines on "do's" and "don't's" for supervisors are included in one company's job performance and behavior observation guidelines. One example is a brief summary outline of some of the signs of deteriorating job performance often associated with drug and alcohol abuse. In this particular case, the company emphasizes that unusual or odd behavior may not always be connected with drug or alcohol abuse and that supervisors should not make judgmental decisions nor should they assume the role of a counselor, diagnostician or policeman. The guidelines in this section and in section 5 underscore the responsibility of the supervisor to act in accordance with the company guidelines for administering the policy on substance abuse/fitness for duty and to take action if the threat of safety impairment is clear, not only for the individual employee but for others.

Behavior observation and job performance assessment will depend upon the supervisor's judgment and working knowledge of the individual employee. Supervisors will need to document performance and behavior and to interpret them in light of the individual employee, his/her past and current work attitude, and capability. There is no substitute for a supervisor knowing his/her employees.

*On-the-Job Behaviors**

Work Performance:

Employees on-the-job behaviors and work habits that directly impact on efficiency and effectiveness of task accomplishment.

1. Has the individual's work *QUALITY* or *QUANTITY* changed?
 - Greatly changed speed of working
 - Changed level of work involvement
2. Has the employee made more *MISTAKES* or *BAD JUDGMENTS*?
 - Has numerous accidents
 - Laughs off errors or reprimands
 - Denies mistakes
 - Unnecessarily condemns self for mistakes

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3. Has the employee's *EFFICIENCY* lessened?
- Has trouble arriving at decisions
 - Often fails to meet deadlines
 - Needs repeated directions for easy tasks
4. Does the individual have more difficulty *CONCENTRATING*?
- Forgets important or obvious things
 - Acts without thinking
 - Daydreams too much
 - Doodles excessively
 - Repeats same action over and over
5. How much is the worker *ABSENT FROM THE JOB*?
- Late or absent, especially Monday or Friday
 - Often takes off half-days
 - Leaves work without notice
 - Falsifies attendance records
 - Takes a lot of sick leave
 - Gives improbable excuses for absences
6. Is the employee *ABSENT "ON THE JOB"*?
- Wanders around the plant a lot
 - Takes excessively long lunches and breaks
 - Avoids a part of the plant because of fear
 - Gets sick while at work
7. Does the employee adhere to *COMPANY POLICY*?
- Steals or damages property
 - Disregards rules
 - Bends the rules
8. Have you noticed the individual becoming *OVERCAUTIOUS*?
- Overreacts to normal conditions
 - Freezes or disappears in an emergency
 - Overly concerned about details/accuracy
 - Doublechecks work too much
9. Has the employee become *OVER-ZEALOUS*?
- Never takes breaks
 - Comes to work early
 - Hangs around after shift
 - Volunteers for excessive amounts of overtime
 - Suddenly exceeds work expectations
10. Does the employee engage in a lot of *RISK-TAKING*?
- Drives recklessly
 - Operates equipment carelessly on or off the job

- Shows poor judgment in dangerous physical activities
- Gambles a lot

11. Has the individual's *COOPERATION* with *CO-WORKERS* changed?

- Refuses to share equipment or information
- Refuses to take directions
- Refuses to accept help from others

Social Interactions:

Type and quality of employee's relationships with work associates that may impact on team performance.

1. Does the employee appear *LESS SOCIABLE* than before?

- Isolated/withdrawn
- Shallow friendships
- Smiles and talks to self
- Refuses social contacts
- Poor eye contact
- Lacks a sense of humor
- Overly suspicious of others
- Holds grudges/sulks

2. Has the individual become *TOO SOCIABLE*?

- Talks too much with other employees
- Unusual talking together
- Plays pranks/jokes
- Monopolizes conversation
- Inappropriate sex behavior
- Flashes money

3. Are there changes in the employee's choice of *FRIENDS*?

- Especially for breaks/lunch or transportation
- Only those younger or easily dominated
- Has separate set of friends just for drinking or gambling

4. Are there changes in the way *OTHER WORKERS* react to him/her?

- Ignore or avoid
- Get angry with
- Become condescending
- Complain about
- Mistrust
- Play pranks on
- Joke about

5. Does the employee show more *ANGER*?

- Impatient
- Overreacts to real or imagined criticism
- Irritable
- Argumentative
- Physical fights
- Temper outbursts

6. Does the individual *MANIPULATE* others?
 - Builds up brownie points
 - Brags/exaggerates
 - Acts naive or innocent
 - Lies
 - Shows off
 - Borrows money
7. Have you noticed any changes in the employee's *SPEECH BEHAVIOR*?
 - Talks slower/faster
 - Talks more/less
 - Stammers
8. Has the employee's *SPEECH CONTENT* changed?
 - Jumps from topic to topics
 - Talks about hopeless future
 - Occupied with suicide, disasters, destruction
 - Occupied with one topic
 - Never chats about family/interests
9. Does the employee have more *COMPLAINTS* about:
 - Physical ailments
 - Back pain/muscle aches
 - Co-workers or superiors
 - Being ignored/left out
 - Family/money problems
 - Lack of privileges
 - Filling out required forms
 - Or has stopped complaining

Personal Health:

Employee's physical and emotional states that affect work behavior.

1. Are you aware of any signs of "*NERVES*" or *EMOTIONAL UPSET*?
 - Headaches
 - Startles easily
 - Cries easily
 - Shaky voice
2. Does the individual use *ALCOHOL* or *DRUGS* differently?
 - Drinks too much
 - Alcohol on breath
 - Preoccupied with drinking or drugs
 - Gulps drinks, especially the first couple
 - Encourages others to use
 - Frequently "on the wagon"
3. Has the individual had unusual *ILLNESS*?
 - Claims large amounts of dental/medical, emotional benefits
 - Slow recovery from illness
 - Preoccupied with death or suddenly religious
 - Ignores own illness
4. Has the individual's *ENERGY LEVEL* changed?
 - Yawning
 - Fatigue
 - Restlessness
 - Fidgeting
5. Are you aware of any changes in *DAILY LIVING ROUTINE*? In *WORK ROUTINE*?
 - Sleep difficulties
 - Change in after-work hobbies, activities
 - Change in amount/pattern of eating
 - Rigidly follows same pattern without reason
6. Have you noticed any changes in the individual's *GENERAL APPEARANCE*?
 - Appears better/more poorly groomed
 - Walks differently (slower, stumbles)
 - Change in posture
7. Have you noticed any *FACIAL* changes?
 - Blushing or paleness
 - Red eyes
 - Dry mouth (frequent swallowing/lipwetting)
 - Dilated pupils
 - Puffy face
 - Difficulty hearing
8. Have you noticed any changes in the individual's *BODY* or *LIMBS*?
 - Shaky hands
 - Nail biting
 - Weight loss/gain
 - Cold, sweaty hands
 - Twitching
 - Sweating, especially nonseasonal
9. Has the employee had any *GASTROINTESTINAL* changes:
 - Nausea/vomiting
 - Stomach ache/gas
 - Frequent trips to the restroom
 - Excessive use of antacids, coffee/tea or other liquids, aspirin, cigarettes
10. Does the employee have any *CARDIOVASCULAR* difficulties?
 - Dizziness/fainting
 - Breathing irregularities
11. Have you noticed any changes in the employee's *THINKING PATTERN*?
 - Sees things that aren't there (hallucinations)
 - False beliefs (delusions)
 - Bizarre or unusual ideas

Part I

Think about the employees you supervise. Do any of them have any of the following characteristics? Go through the list below and place an "x" next to each characteristic you have noted in any of your employees.

Changes in

1. Absenteeism

- ☐ A. Instances of unauthorized leave
- ☐ B. Excessive sick leave
- ☐ C. Frequent Monday and/or Friday absences
- ☐ D. Repeated absences, particularly if they follow a pattern
- ☐ E. Excessive tardiness, especially on Monday mornings or in returning from lunch
- ☐ F. Leaving work early
- ☐ G. Peculiar and increasingly improbable excuses for absences
- ☐ H. Higher absenteeism rate than other employees for colds, flu, gastritis, etc.
- ☐ I. Frequent unscheduled short-term absences (with or without medical explanation)

2. "On-the-Job" Absenteeism

- ☐ A. Continued absences from post more than job requires
- ☐ B. Long coffee breaks
- ☐ C. Repeated undealt-with physical illness on the job

3. High Accident Rate

- ☐ A. Accidents on the job
- ☐ B. Accidents off the job (but affecting job performance)

4. Difficulty in Concentration

- ☐ A. Work requires greater effort
- ☐ B. Jobs take more time

5. Confusion

- ☐ A. Difficulty in recalling instructions, details, etc.
- ☐ B. Increasing difficulty in handling complex assignments
- ☐ C. Difficulty in recalling own mistakes

6. Spasmodic Work Patterns

- ☐ A. Alternate periods of high and low productivity

7. Reporting to Work

- ☐ A. Coming to/returning to work in an obviously abnormal condition

8. Generally Lowered Job Efficiency

- ☐ A. Missed deadlines
- ☐ B. Mistakes due to inattention or poor judgment
- ☐ C. Wasting more material
- ☐ D. Making bad decisions
- ☐ E. Complaints from customers or clients
- ☐ F. Improbable excuses for poor job performance

9. Poor Employee Relationships on the Job

- ☐ A. Over-reaction to real or imagined criticism
- ☐ B. Wide swings in morale
- ☐ C. Borrowing money from co-workers
- ☐ D. Complaints from co workers
- ☐ E. Unreasonable resentments
- ☐ F. Avoidance of associates

Part II

Now, go back over the list and indicate in the left hand margin how you felt about this type of employee's behavior.

- ☐ A. ☐ I felt helpless.
- ☐ B. ☐ I felt sad.
- ☐ C. ☐ I felt hurt.
- ☐ D. ☐ I felt let down.
- ☐ E. ☐ I was fearful of approaching employee.
- ☐ F. ☐ I was fearful of doing the wrong thing.
- ☐ G. ☐ I was fearful of what my boss would say.
- ☐ H. ☐ I felt guilty somehow.
- ☐ I. ☐ I felt angry.
- ☐ J. ☐ I felt superior.
- ☐ K. ☐ I felt frustrated.
- ☐ L. ☐ Other.

Part III

One more time, go over the list and indicate in the left hand margin what you did about this behavior.

- ☐ A. ☐ I did nothing, I ignored it.
- ☐ B. ☐ I covered up for him/her.
- ☐ C. ☐ I gave him/her a good "chewing out."
- ☐ D. ☐ I moved him/her to a less demanding job.
- ☐ E. ☐ I cut off communications with him/her.
- ☐ F. ☐ I complained to others (my boss, colleague, secretary, wife/husband, etc.)
- ☐ G. ☐ I threatened him/her.
- ☐ H. ☐ I did his/her work.

- ☐ I. ☐ I promoted him/her.
- ☐ J. ☐ I persuaded him/her to retire.
- ☐ K. ☐ I resigned/retired.
- ☐ L. ☐ I discussed it.
- ☐ M. ☐ I helped.
- ☐ N. ☐ I did something else.

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What Data Should Supervisors Document?*

General Instructions

It is important that data which is collected be as specific as possible and be centered on job performance or any unusual behavior on the job. Recurring patterns ought to be noted. Everyone has an "off day" once in a while so observation or documentation should go on over a period of time. Collection of data helps the supervisor make a fair and impartial assessment of job performance. It also guards against "euphoric recall," that is remembering only the peaks of performance—the "good days" and not the "bad days." The supervisor is not a counselor or judge of the employee. Rather he is someone who assesses performance and then asks for assistance from the Employee Assistance Program.

Job Performance

1. Frequent absence or days off with vague or impossible excuses
2. Excessive use of sick leave
3. Tardiness
4. Early departures
5. Erratic or deteriorating production
6. Missed deadlines
7. Failure to follow instructions
8. Errors in judgment
9. Absent from post frequently
10. Repeated or unreasonable accidents on or off the job
11. Patterns of decreased efficiency as compared to past performance

Other Indications

1. Complaints from fellow workers about an employee who is difficult to "get along with"
2. Over-reaction to criticism
3. Able to get other workers to take over job responsibilities for no good reason

4. Begins to avoid associates
5. Personal appearance becomes "sloppy"
6. May appear withdrawn or preoccupied
7. Wide mood swings during the day for no apparent reason
8. Might smell of liquor or use breath deodorizers

Data Pertinent to Supervisory Level

1. Becomes lax in his supervisory duties
2. Issues conflicting instructions to employees
3. Uses employee's time and skills to cover responsibilities
4. Submits incomplete reports and data
5. Mismanages budgets
6. Fails to coordinate schedules

Specific Actions by the Supervisor*

Specific action to be taken by the supervisor to correct poor job performance due to emotionally based personal behavior problems does not differ basically from action to be taken to correct poor job performance resulting from any other reasons. Action to be taken is outlined under two headings: What the supervisor should do, and what the supervisor should not do.

What the supervisor should do

1. The supervisor should make sure each of his employees is informed about and understands what is expected of him in terms of work performance and attendance.
2. The supervisor should be alert, through continuing observation, to changes in the work and behavioral patterns of employees under his supervision.
3. The supervisor should document all unacceptable behavior, attendance and job performance that fails to meet established standards.
4. The supervisor should discuss deteriorating work performance, attitude or attendance with the employee. Make it clear that the Company is concerned with job performance. Unless performance improves, his job is in jeopardy.

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5. The supervisor should monitor employees' work performance, intervene if work continues to deteriorate and suggest that the employee contact the Employee Assistance Program Director. In referring the employee to the program, he should explain that the employee must decide for himself whether or not to seek assistance, emphasizing that all aspects of the program are strictly confidential. The supervisor should notify his supervision through the customary channels of any proposed action regarding an employee.
6. The supervisor should be aware that the alcoholic tends to deny his illness. The sicker an individual becomes, the more convinced he tends to be that he doesn't have a problem—or at least a problem he can't handle himself.
7. Be sure all employees are aware of the service available to them through this program.

What the supervisor should not do

1. The supervisor should not play the role of "amateur diagnostician." He is not necessarily qualified to judge whether an employee is an "alcoholic." The supervisor must stick to job performance. Don't moralize!
2. The supervisor should not discuss whether or not any employee has a "drinking problem" or attempt to counsel him in this regard. He should not discuss drinking unless it occurs on the job.
3. The supervisor should not recommend termination of a previously satisfactory employee without first offering help through the Employee Assistance Program if it's not possible his poor performance is the result of emotionally based personal behavior problems.
4. The supervisor must not engage in any "cover-up" activities regarding any "problem employee."

IT IS THE SUPERVISOR'S RESPONSIBILITY TO IMPLEMENT THESE PROCEDURES.

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Behavior and Job Performance "Warning Signs"

Job behavior and work performance should be the concern of the Supervisor. Expert knowledge about abuse of controlled substances or abused drugs isn't necessary, but the Supervisor should remain alert to changes from the *normal* work pattern and/or behavior of the employee.

It's the responsibility of the Supervisor to act in accordance with Company guidelines for administering the policy on drug abuse. It's important to take immediate steps, since delayed action can threaten the safety of others and result in the total deterioration of the abuser.

Listed you will find various "warning signs" that usually appear on the job, indicating some consequences of abuse. It's impossible to rate all behavioral and work pattern problems that occur in this process of deterioration. They can appear singularly or in combination. They may signify problems other than substance abuse. For example, alcoholism, diabetes, high blood pressure, thyroid disease, psychiatric disorders, emotional problems and certain heart conditions all share some of the same signs. *Therefore, it's important to remember that unusual or odd behavior may not be connected in any way with drug or alcohol abuse.* The role of the Supervisor is to recognize and document changes without making any moral judgment or taking the position of counselor or diagnostician.

Signs of Deteriorating Job Performance

Physical Signs or Condition

Weariness, exhaustion
Untidiness
Yawning excessively
Blank stare
Slurred speech
Sleepiness (nodding)
Unsteady walk
Sunglasses worn at inappropriate times
Unusual effort to cover arms
Changes in appearance after lunch or break

Mood

Appears to be depressed all the time or
extremely anxious all the time

Irritable

Suspicious

Complains about others

Emotional unsteadiness (e.g., outbursts
of crying)

Mood changes after lunch or break

Actions

Withdrawn or improperly talkative

Spends excessive amount of time on the
telephone

Argumentative

Has exaggerated sense of self-
importance

Displays violent behavior

Avoids talking with Supervisor regarding
work issues

Absenteeism

Acceleration of absenteeism and
tardiness, especially Mondays,

Fridays, before and after holidays

Frequent unreported absences, later
explained as "emergencies"

Unusually high incidence of colds, flu,
upset stomach, headaches

Frequent use of unscheduled vacation
time

Leaving work area more than necessary
(e.g., frequent trips to water fountain
and bathroom)

Unexplained disappearance from the job
with difficulty in locating employee

Requesting to leave work early for
various reasons

Accidents

Taking of needless risks

Disregard for safety of others

Higher than average accident rate on
and off the job

Work Patterns

Inconsistency in quality of work

High and low periods of productivity

Poor judgment/more mistakes than usual
and general carelessness

Lapses in concentration

Difficulty in recalling instructions

Difficulty in remembering own mistakes

Using more time to complete work/missing
deadlines

Increased difficulty in handling complex
situations

Relationship to Others on the Job

Overreaction to real or imagined criticism

Avoiding and withdrawing from peers

Complaints from co-workers

Borrowing money from fellow employees

Complaints of problems at home, such as
separation, divorce and child discipline
problems

Persistent job transfer requests

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A liaison visit by the plant or division senior official to the local chief of police accompanied by the security director or security officer for that facility, is a sound approach. During that visit, the company's drug policy and awareness program can be outlined. The company's intention to notify the police when suspected substances are found and specific reporting procedures between security and police can also be confirmed.

Such a visit will usually be welcomed by local law enforcement officers and will likely generate an appreciation of the company's commitment to work with law enforcement and within the law, while also improving cooperation on this and other matters. Generally, prompt police notification results in less rather than more publicity, and avoids the perception by the media of an attempted cover-up on the part of the company. On the contrary, it shows that the company is facing up to a widespread problem in society, and one which the company itself is committed to removing from the work place.

9. Chemical Testing of Body Fluids

Chemical testing of body fluids is becoming more widely used throughout the electric utility industry to identify persons who use drugs illegally. It is an objective means to determine whether or not a person actually has drugs in his/her system. This can be especially important when disciplinary action may be necessary. Urine testing is the most common method used to detect drug use. Blood testing may also be used to detect the presence of drugs and/or alcohol. A more common method for determining alcohol levels in the body is the use of a breath analyzer.

Typical situations in which chemical testing is used fall into three general categories:

- a. **Pre-Employment Screening** is used to identify drug users before the hiring decision is made. Companies inform prospective employees that they are subject to drug/alcohol testing as part of the pre-employment screening process. The major benefit of pre-employment screening is that it provides the company with additional background information prior to employment.

Since the employer-employee relationship has not yet begun, the employer has the right to condition employment on an applicant's successful passing of a physical

examination which may include chemical testing of body fluids for drugs and/or alcohol. An applicant objecting to such an examination has the right to decline to participate in such an examination, and the company has the right to refuse to hire the applicant.

- b. Testing "For Cause" is used to verify whether or not an employee suspected of drug or alcohol abuse has in fact used prohibited drugs or alcohol. When an employee is referred for a fitness for duty medical evaluation, body fluid samples will be requested from the individual and will be analyzed by trained laboratory technicians to determine if (and what) chemicals which indicate substance abuse are present in the body fluid sample. The need for this type of testing is usually determined from behavioral observation, performance problems or other evidence that the employee may be involved with illegal use of controlled substances. It should be noted that, from a legal sense, objective evidence of use can be obtained through chemical testing.

- c. **Random or Regular Periodic Chemical Testing** can be used to provide added confidence that employees in designated positions are complying with the company's policy on drug use. This method is presently being used successfully at several companies as a way to demonstrate continuing achievement of a safe and drug-free work environment. It is sometimes included as part of a regular physical examination. An example of a drug screening procedure used at a nuclear power plant is reproduced at the end of this section. This use of chemical testing is a sensitive issue in that it may be perceived as an indication of a "lack of confidence" in employees or an invasion of personal privacy; accordingly, it should be initiated and administered carefully.

If a company decides that chemical testing is desirable for any of the purposes described above, experience has shown that considerable care must be taken to ensure that testing results are accurate and that the program serves as an effective deterrent to illegal drug use. The following factors should be considered:

- **Advance notification** to employees that they are or may be subject to chemical testing for drug or alcohol abuse is an impor-

tant step in promoting the deterrent value of the program. Especially in the case of regular or random testing, it is important that employees understand that the purpose of the program is not to entrap anyone, but to provide objective evidence that persons subject to the program are or are not using prohibited substances.

- Accountability procedures for urine or other body fluid specimens should be comprehensive and detailed to ensure that valid samples are received from employees being tested, are appropriately labeled and kept under custody controls that will preclude substitution of invalid specimens before analysis. Drug users familiar with urinalysis testing have been known to show considerable resourcefulness in preventing their own urine samples from being analyzed.

Care should be taken also to prevent contamination of the sample after collection and before analysis; back-up samples also need to be protected from deliberate or accidental contamination. The number of individuals handling the sample before analysis should be limited as much as possible. A record of the identities of individuals handling fluid samples should be kept. The carefully maintained chain of accountability may be of assistance should the employee-donor claim that his sample was contaminated before laboratory analysis.

- The testing facility's methods and techniques need to be reliable. There are several commercial laboratories available throughout the country that provide chemical testing services. Careful selection of a reputable testing laboratory with stringent quality controls on specimen accountability and analysis and prompt reporting of test results is worth substantial time and effort.
- Courts have held that chemical testing of employees is legal, provided that testing is performed in a non-discriminatory way. It must be fair, and be applied consistently to all appropriate persons. Use of voluntary consent forms can be helpful in ensuring that employees understand the testing program.

Use of voluntary consent forms can be helpful in ensuring that employees understand the testing program.

- Clinical laboratory testing is subject to a wide number of variables that may significantly alter results and cause misinterpretation. False positive, false negative and erroneous reports are relatively infrequent, but the possibility must be considered if disciplinary actions are to be based on test findings. The results of chemical testing should be maintained as confidential as possible. Personnel involved with processing chemical tests should be instructed in the need for confidentiality.

Considerable attention should be given to determining what test levels will be considered as positive evidence of drug use. Various laboratories may use different levels in determining if test results are positive indications of drug use. If more than one laboratory is used without clear direction on the levels to be considered positive, ambiguity can result. Modern testing equipment is capable of detecting chemicals at levels below those that are definite indications of drug use. For example, passive inhalation, but not active use, of marijuana can cause detectable levels of THC in urine.

*Procedure for "Fitness for Duty" Screening for Georgia Power Nuclear Construction, Project Management, Project Field Engineering, and Contractor Non-Manual Employees**

I. Purpose

The purpose of this procedure is to establish the guidelines to be followed for fitness for duty screening for all GPC Nuclear Construction, Project Management, Project Field Engineering, Temporary Service Contractors and Contractor Non-Manual employees at Plant Vogtle.

II. Responsibility

The General Manager—Vogtle Nuclear Construction Department has the overall responsibility for this program. The Site Labor Relations Coordinator has the functional responsibility for the administration of the program. The Construction Safety Supervisor is responsible for the coordination with the

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Toxicological Services contracted in performing the screenings and the scheduling of employees to be tested.

The contracted Toxicological Service will be responsible for the handling and transfer of custody for all specimens collected to be tested. The contracted Toxicological Service will also be responsible for providing a courier service to transport the specimens from Plant Vogtle to the testing facility.

III. Procedure

A. Scheduling for Screening

Employees will be scheduled alphabetically by shift. There will be 5 employees scheduled every 30 minutes, beginning with GPC Nuclear Construction and followed in order as listed above. Contractor non-manual employees will be scheduled the same beginning with the largest and followed in order by manpower numbers to the smallest.

B. Consent for Screening

Employees, at their scheduled times, will be assembled in the Safety Department's Conference Room. The screening procedure will be explained and the employees will be asked to list all medications (prescription and/or over the counter) he/she is taking, within the last 30 days, the condition for which taken and the prescribing physician on the "Employee Consent for Drug Analysis" form (see exhibit 1). The employee will not be required to sign the consent form at this time.

The employees will be individually escorted by the GPC Safety Inspector to the Safety Department's screening room. The "Employee Consent for Drug Analysis" form will be given to a technician of the contracted Toxicological Service. The employee will be required to present positive identification such as Plant Vogtle ID or Drivers License. He/she will sign the form and it will be witnessed by the Toxicological Services technician.

If an employee refuses to submit to the screening or sign the consent form, he/she will be referred to the General Manager—Vogtle Nuclear Construction Department or GPC Manager of Administrative Operations to be interviewed. A decision will be made to either terminate or approve a special exception option. Termination will result in permanent denial of access to any Georgia Power Company facility in the future.

C. Collection of Specimens

The technician will number two (2) screw cap specimen containers identically with in-

delible ink. All employee specimens will be sequentially numbered beginning with V0001. The employee will sign two (2) gummed labels with his/her signature on the label. This will be done in the presence of the employee. The employee will initial below the specimen container number with indelible ink.

The specimen number, employee's name, employee number, and date will be entered on the "Specimen Log" (see exhibit 2) and signed by the technician. This will be done in the presence of the employee. The employee will place his/her initials in the appropriate space on the log.

The urine specimen of at least 80 ML shall be collected in the presence of and witnessed by the Toxicological Service Technician. Male employees will be witnessed by a male technician and female employees by a female technician. The specimen shall be placed in 2 screw cap specimen containers, one of which must contain at least 50 ML of urine. The second specimen must contain at least 30 ML of urine.

After the sample has been collected, the gummed labels will be attached to the containers whereby it acts as a seal. Both containers will then be dipped in hot wax sealing the lids in the presence of the employee. The 50 ML samples will be retained by the Toxicological Service technician for transporting to the lab at the end of each day of testing. The 30 ML sample will be maintained in a locked freezer located in the Safety Department and will be used for confirmation if necessary.

D. Handling and Transporting of Specimens

The Toxicological Service technician will initiate a specimen packing list that will include the identification number of each specimen, date collected, and date of shipment. The technician will place his/her name, signature, and date on the packing list (exhibit 3). The specimen packing list will be placed in an envelope and secured to the shipping container. A copy of the specimen packing list will be given to the Construction Safety Supervisor.

The Toxicological Service technician will initiate a transfer of custody document (exhibit 4). The document will include the name and signature of the technician originating the shipment of specimens and date of shipment.

The courier will place his/her name, signature, and date in the appropriate space on the transfer of custody document. The courier then assumes custody of the contents of this

shipment. A copy of the transfer of custody document will be given to the Construction Safety Supervisor to be maintained as part of permanent records.

When the testing facility receives the shipment from the courier, the technician receiving the shipment shall assume the responsibility of the contents by placing his/her name, signature and date received in the appropriate spaces on the transfer of custody document. A copy of the final document shall be retained by the Toxicological Service and the original document shall be returned to the Construction Safety Supervisor by courier the next day to be maintained as part of permanent records.

The receiving technician shall verify the contents of the shipping container with the packing list. Any discrepancies shall be noted on the packing list and the on-site technician shall be notified by phone immediately. The receiving technician shall place his/her name, signature and date on the packing list. The packing list will be returned to the Construction Safety Supervisor by courier the next day.

E. Handling and Processing Results

Analytical results will be returned no later than 72 hours after receiving specimens. The results shall be identified by the employee's name, company, employee number, and specimen number. The results will be delivered by the courier to the Construction Safety Supervisor when returning to site to pick up specimens for testing.

1. GPC Nuclear Construction and Project Management

The Construction Safety Supervisor or his designee will hand deliver copies of all analytical results to the Site Human Resources Supervisor for placing in the employees' personnel files.

If the results are negative, the appropriate manager and department head will be notified. They, in turn, will notify the employee. The employee's specimen will be removed from the freezer and disposed. A copy of the completed "Specimen Log" will be used to verify with the label and specimen number on the specimen container. This copy will also be used to maintain the inventory in the freezer. As specimens are removed, the specimen number will be marked off the log and initialed by the GPC Safety Inspector removing the contents.

If the results are positive, the respective manager will be notified. The manager will interview the employee and decide to either terminate or request to the General Manager—Vogtle Nuclear Construction Department for an appeal based upon the validity of the employee's response. The managers shall keep written records of all interviews and meetings with the employee. The employee's specimen will remain in the freezer.

2. Project Field Engineering Employees

The Construction Safety Supervisor or his designee will hand deliver copies of all analytical results to the Project Field Engineering Manager, or his designee, for placing in the employee's personnel files.

If the results are negative, the manager, or his designee, will notify the employee. The employee's specimen will be verified and disposed as stated in III.E.1.

If the results are positive, the manager will interview the employee and decide to either terminate or request to the General Manager—Vogtle Nuclear Construction Department for an appeal based upon the validity of the employee's response. The managers shall keep written records of all interviews and meetings with the employee. The employee's specimen will remain in the freezer.

3. Contractor Non-Manual Employees

The Construction Safety Supervisor or his designee will hand deliver copies of all analytical results to the respective Project Manager, or his designee, for placing in the employee's personnel files. If the results are negative, the Project Manager, or his designee, will notify the employee. The employee's specimen will be verified and disposed as stated in III.E.1.

If the results are positive, the Project Manager will interview the employee and decide to either terminate or request to the General Manager—Vogtle Nuclear Construction Department for an appeal based upon the validity of the employee's response. The employee's specimen will remain in the freezer.

F. Appeal Process

The employee will be suspended without pay at the time the appeal is granted. The General Manager or his designee will notify the Construction Safety Supervisor that an appeal has been granted for a secondary confirmation test. The GPC Safety Inspector will remove the employee's frozen specimen from the freezer and it will be entered on the packing list with other specimens taken that day. The specimen will be marked "Confirmation Test" and the packing list will reflect the same. The "Specimen Log" will be noted to reflect the specimen has been removed from secondary confirmation and initialed by the GPC Safety

Inspector removing the specimen. The specimen will be turned over to the technician responsible for packing specimens to be transported to the Toxicological Service lab. The secondary confirmation test will be conducted using a different technician for all substances detected as positive in the initial screening. The analytical results will be returned by the courier to the Construction Safety Supervisor. Notification of the results will be given to the respective manager and copies handled as stated in Section III.E.1, 2 and 3. If the results are positive, the employee will be terminated as of the date of suspension. If the results are negative, the employee will be reinstated with no loss of wages.

EMPLOYEE CONSENT FOR DRUG ANALYSIS

I, _____, ^{print} Employee No. _____

do hereby give my consent to Georgia Power Company and (name of Toxicological Service Co.) to perform appropriate tests or examinations on me for drugs. I further give my permission to Georgia Power Company and (name of Toxicological Service Co.) to release the results of the tests or examinations to my employer.

I have taken or am taking the following medications with the past 30 days:

Name of Drug	Condition for which taken	Prescribing Physician/Over the Counter
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Specimen No. V- _____

(Signature of employee being tested) Date (Witness)

Employer

TRANSFER OF CUSTODY DOCUMENT

Specimens Released to Courier by: _____
(Please Print)

(Signature) (Date)

Specimens Transported by: _____
(Please Print)

(Signature) (Date)

Specimens Received by: _____
(Please Print)

(Signature) (Date)

δ

Specimen No.

[illegible]

Road

*Ed - Drug Tests
KJ May*

BRACEWELL & PATTERSON

2900 SOUTH TOWER PENNZOIL PLACE
HOUSTON, TEXAS 77002
713 223 2900
CABLE BRACEPAT HOUSTON
TELEX 78 2141

1825 EYE STREET N.W.
WASHINGTON, D.C. 20006
202 828 3800
TELEX 89 2573
22 GROSVENOR SQUARE
LONDON W1X 0DY
01 491 4805
TELEX 23459
1630 AMERICAN BANK TOWER
AUSTIN, TEXAS 78701
512 472 7800

April 8, 1986

OPINION LETTER ON DRUG TESTING

Dear _____

You recently wrote us concerning your plans to implement TASB Policy DBA (Update 25) which contains a bus driver credential requiring preemployment and annual physical examinations that reveal physical and mental capabilities to safely operate a school bus. After extensive research, we can now answer your questions concerning this policy. Please accept my personal apology for the delay in answering these questions. As you might expect, the legal issues with regard to testing for drug usage are quite involved.

With regard to the proposed policy, you have asked us to review the following questions:

- (1) Can the preemployment physical examination include a test for determining the use of drugs, hallucinogens, or other substances regulated by the Texas Controlled Substances Act?
- (2) If the answer to the above is yes, can the test be required only of new employees or must all current bus drivers also be tested?
- (3) Can a specific group or segment be required to take such test (i.e., bus drivers) and exclude all other district employees?

First it should be pointed out that your District is required by statute and rule to require preemployment and annual physical examinations. Article 6687b, §5 states:

It shall be unlawful for any person to be employed to drive a motor vehicle while in use as a school

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bus for the transportation of pupils who has not undergone a physical examination which reveals his physical and mental capabilities to safely operate a school bus. Such physical examinations shall be conducted annually for each driver.

Texas Administrative Code, Section 85.214 requires:

- (b) The Board of Trustees of any school district or county board providing transportation of students to and from school shall employ school bus drivers in compliance with the provisions of this section.
- (c) All drivers employed to transport school children shall:

. . .

(3) have undergone an annual physical examination completed on forms furnished by the Texas Education Agency which reveals the drivers' physical and mental capabilities to operate a school bus safely.

The form provided by the Texas Education Agency (TEA) for the annual physical examination has a section for testing in relation to drug or alcohol abuse. This section requires that if a driver is known to have used drugs within the past 24 months or if the District has reason to believe that such use has occurred, then the doctor shall annually test that driver for drug addiction or abuse.

The Legislature's intent in enacting Art. 6687b §5 is obviously to insure the safety of school children riding school buses. A physical examination which did not test for controlled substance use which might alter a bus driver's driving ability would not fully serve the purpose of the law. The legal dilemma presented by your first question is whether the District, as a governmental employer, must have a reasonable suspicion that a bus driver is using drugs before it may include a test for the use of drugs in its preemployment or annual physical examinations.

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There is very little legal authority in the Texas courts or in the federal courts in the Fifth Circuit which deals directly with this question. Therefore, we found it necessary to review the cases dealing with this point of law on a nationwide basis. These cases seem to indicate that it is lawful for a public employer to require preemployment and annual drug testing of employees, particularly those with a high degree of responsibility to the public such as school bus drivers.

Before reviewing the cases from other circuits, it is interesting to note that the Attorney General of Texas has advised that it is lawful for the TEA and the Department of Public Safety to promulgate reasonable standards in addition to those set forth in Art. 6687b for determining whether an individual is physically capable of safely operating a school bus. The Attorney General's opinion noted that these agencies may conclude that to be deemed capable of operating a bus, a prospective school bus driver must be able to hear at a certain minimum level. Testing for hearing and testing for drug usage are analogous in that both are related to the ability to drive a school bus safely. If a test for hearing is a reasonable standard in addition to those set forth in Art. 6687b, it is reasonable to conclude that, given no other legal problems, a test for drug abuse is also a reasonable standard in addition to those set forth in Art. 6687b.

Case law from other states and circuits indicates that preemployment and annual testing for drug usage is an acceptable practice. Unfortunately, it appears that the courts in Texas and the Fifth Circuit have not yet directly faced this issue. The cases we have reviewed basically suggest that preemployment or annual testing for drug usage is constitutionally acceptable since it is not random, is done in an employment, not criminal, context and may be related to a person's ability to carry out the duties of particular forms of employment.

In the case of Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscv, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976), the bus drivers' union brought action against the Chicago Transit Authority challenging the constitutionality of rules requiring bus drivers to submit

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to blood or urine tests following their involvement in a serious accident or when they were suspected of being intoxicated or under the influence of narcotics. The Court of Appeals held that the state had a paramount interest in protecting the public by insuring that bus drivers were fit to perform their jobs. Consequently, bus drivers had no reasonable expectation of privacy with regard to blood and urine tests under the circumstances enumerated in the rule. The court went on to state that it is clear that a governmental agency can place reasonable conditions on public employment. The court concluded that the public interest in the safety of mass transit riders outweighed any individual interest of the drivers in refusing to disclose physical evidence of intoxication or drug abuse. Suscy recognized the importance of drug testing for publicly-employed bus drivers, but still limited such testing to situations involving employees directly involved "in any serious accident" or "suspected of being under the influence" of intoxicating liquor or narcotics. Other cases seem to indicate that preemployment or annual testing may be utilized in situations where there is no probable cause or reasonable suspicion that drug abuse has occurred.

In McDowell v. Hunter, 612 F.Supp. 1122 (D.C. Iowa 1985), a department of corrections employee in Iowa brought an action challenging the constitutionality of a department policy subjecting employees to searches of their vehicles and persons. The court concluded that the Fourth Amendment allows defendants to demand of an employee a urine, blood or breath specimen for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in the light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances. However, the court specifically noted that the Fourth Amendment does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees, nor does it prohibit taking a specimen of blood, urine, or breath on a periodic basis as a condition of continued employment under a disciplinary disposition if such condition is reasonably related to the underlying basis for the disciplinary action and the duration of the condition is

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specified and is reasonable in length.

In Allen v. City of Marietta, 601 F.Supp. 482 (N.D. Ga. 1985), a federal district court in Georgia held that urinalysis tests administered to government employees were not unreasonable searches in violation of the Fourth Amendment, as such tests were administered in a purely employment context as part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work, rather than for law enforcement purposes. Part of the decision in Allen v. City of Marietta is very relevant to the questions you have asked and is set out in context:

This court believes that the theme underlying all of the cases discussing searches of government employees can be summarized as follows. Government employees do not surrender their fourth amendment rights merely because they go to work for the government. They have as much of a right to be free from warrantless government searches as any other citizens. At the same time, however, the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties. [The search is reasonable if it is] undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities. Because the government as employer has the same rights to discover and prevent employee misconduct relevant to the employee's performance of her duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature . . . [T]he court finds no evidence whatsoever that the urinalysis tests in this case were conducted for any criminal investigatory purpose. The only facts before the court establish as a matter of law that the tests were administered in a purely employment context as part of the government's legitimate inquiry into the use of drugs by employees... The City has a right to make warrantless searches of its employees for the purpose

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of determining whether they are using or abusing drugs which would affect their ability to perform safely their work with hazardous materials. 601 F.Supp. 482 at 491.

In a recent Florida case, City of Palm Bay v. Bauman, et al, 475 So.2d 1322 (Fla.App. 5 Dist. 1985), the city was permanently enjoined from requiring police officers and fire fighters to give urine specimens at random and unspecified times for the purpose of determining the presence of controlled substances unless a reasonable suspicion existed. The court noted, however, that this case did not involve urine testing conducted as part of an annual or other specified physical examination delineated in city policy. Therefore, the court excluded from the scope of the permanent injunction any urine testing performed as part of physical examinations required by city personnel policy for initial employment, or annually, or at other designated career times. The court went further to say that police officers and fire fighters, because of the nature of their jobs, must reasonably expect their employer to have, and to demonstrate, legitimate concern that their ability to discharge their job responsibilities is not compromised by the use of controlled substances. These officers must expect to meet required minimum standards of physical condition in order to be hired and retained. Physical examinations conducted to insure that those standards are met are to be reasonably expected even though urine testing is a part of those examinations.

The most recent case found which involved this issue is Jones v. McKenzie, No. 85-1624 (U.S.D.C.--D.C., Feb. 25, 1986). The ultimate question presented in Jones is whether a school bus attendant assisting handicapped students in traveling by bus to and from school has a reasonable expectation of privacy from a search by mandatory urine testing for drugs and whether any such expectation is outweighed by public safety considerations. The testing in Jones which was performed without any additional confirmatory testing was found to violate the attendant's procedural due process rights and his 4th Amendment rights against unreasonable searches. However, the court noted that school bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be

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subject to urine and blood tests not required of other school personnel without particularized suspicion.

Based on the Attorney General's opinion and on cases from other jurisdictions, it appears that drug testing during preemployment and annual physical examinations is permissible. Of course, we cannot predict with certainty what decision a Texas court or the Fifth Circuit would reach on this issue since any decision would be heavily dependent on the specific facts presented to the court. It appears that the more regular and predictable the tests are, the more likely it is that they will be able to withstand a challenge on constitutional grounds. Courts have not looked with favor on unannounced, irregular testing. Consequently, preemployment and annual physical examinations seem to be a good vehicle for implementing such a testing program.

In answer to your second question, the cases researched indicate the test can be required for new employees alone as part of the preemployment physical examination. If all current bus drivers are to be tested also, then it would probably be safest to include such testing as part of the annual physical examination required by state law. All current drivers should receive adequate notice well before the examination that the test for drug usage has been added to the annual physical examination. Any testing administered outside the annual or preemployment context may be considered a random search, and the District should not require such testing without reasonable suspicion that drug usage has occurred. The decision to require the test for drug usage as part of the preemployment and annual physical examination is, of course, a matter for the Board of Trustees.

Your third question asks whether school bus drivers can be singled out for drug testing. Since school bus drivers are not considered a suspect class under federal law, the courts are not required to strictly scrutinize procedure which treats school bus drivers as a group differently than other types of employees. In order to require testing for drug use only for school bus drivers while excluding all other district employees, the testing need only bear a rational relationship to an important governmental interest. Although we have found no cases directly addressing this

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point, the cases do indicate by implication that the proposed testing is rationally related to the important interest of having qualified bus drivers who do not use controlled substances, thereby helping to insure the safety of school children riding school buses. Before the administration of any drug testing, we suggest that a written board policy in this area be adopted and that all affected employees be given actual notice of the policy. This can be done by providing a copy of the policy to all school bus drivers or by notifying them by letter that drug testing will be made a part of the preemployment and annual physical examination. Implementation of an official policy in this area will avoid confusion and reduce the risk of litigation arising from charges regarding lack of due process or notice.

In the preemployment context, notice may be given to applicants through an acknowledgment in the application form. The applicant should be required to sign the acknowledgment which will serve as proof that the applicant had notice that testing for drug usage would be performed as part of the application process and/or annually thereafter. The acknowledgment would also show that the applicant consented to such testing.

If the Board should decide to enact a policy including preemployment drug testing for bus driver applicants or annual drug testing as part of the regular physical examinations required by state law for all school bus drivers, we would be glad to review such a policy before it goes into effect. Also, you may wish that we review the notice which should be sent to all current bus drivers before any initial drug testing occurs or the acknowledgment to be used as part of the application form.

As part of our research, we contacted David Thompson, the chief counsel of the TEA, Billy Jack Edwards of the TEA's Division of Transportation, and attorneys at the TASB. These sources informed us of no statute, case, or regulation disallowing the use of preemployment drug testing for school bus drivers. We were also informed that although several school districts in Texas have considered implementing policies dealing with drug testing for employees, few, if any, have thus far implemented such a policy. The Board

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should be advised that even though a policy requiring preemployment or annual drug testing for school bus drivers appears to be relatively safe from a legal viewpoint, the District would be the first or one of the first school districts to have such a policy in Texas.

In addition to the questions you have raised, other legal issues arise in connection to testing for drug usage. Any drug testing, either preemployment or annually, must be performed in a reasonable manner. The test must be administered universally and consistently to all applicants seeking the bus driver position and/or to all present employees during an annual examination. The testing, either by urinalysis or blood sample, should be done in a manner which will minimize the invasion of the applicant's privacy and avoid undue embarrassment. Information obtained from the test for drug usage must be maintained on separate forms and afforded the confidentiality of medical records. Otherwise, those being tested may argue that the testing is being used to find evidence of criminal wrongdoing which would significantly alter the standard for determining when testing would be permissible. These approaches should aid in diminishing a charge that the District uses the testing to discriminate against any particular employee or that the District is merely acting as an agent for law enforcement authorities.

Also, it is important that any testing be done in accordance with the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act applies to programs receiving federal financial assistance and states that an otherwise qualified handicapped individual cannot be denied the benefit of any program receiving federal financial assistance solely on the basis of the handicap. Drug or alcohol addiction has been considered a handicapping condition under the Act. Therefore, the use of drug testing could submit the District to discrimination charges based on a handicapping condition if applicants are not hired or employees are terminated on the basis of testing results indicating drug usage. If §504 applies to the District, it would not require the District to employ people who cannot work in a safe or efficient manner. A handicapped person is not otherwise qualified if he or she cannot meet all of a job's requirements in spite of the handicap. Strong argument can be made that a drug user cannot meet the requirements for a school bus driver

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since drug use diminishes a person's driving capacity. There are very few cases dealing with drug abuse handicaps under federal law so the law is very unsettled. Government employers who do not want to hire drug users or want to discharge drug-using employees should base such decisions on valid safety and productivity concerns to minimize the risk of handicap discrimination charges and liability for such charges. It should be noted that the safety of students is paramount. It is difficult to imagine that a court would require the District to reasonably accomodate a drug abuser by allowing such person to drive a school bus thereby endangering the lives of students riding on it.

After you have examined this letter and the information contained in it, please do not hesitate to contact us if you have any questions or wish to discuss the matter in further detail. With kindest regards, I remain

Very truly yours,

Bracewell & Patterson

Stephen L. Braun

Stephen L. Braun

SL2/lp

cc: Mr. Frels
Bracewell & Patterson

7S2SF

DISCIPLINE OF TEACHERS FOR REASONS
OF "IMMORALITY"

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I. SIGNIFICANT COURT DECISIONS

A. The general standard for determining what "immorality" means.

1. Immorality is any course of conduct which offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate.

a. Horosko v. School District, 335 Pa. 369, 6 A.2d 866 (1939), cert. denied, 308 U.S. 553 (1939).

b. In re Flannery's Appeal, 406 Pa. 515, 178 A.2d 751 (1962).

c. Clarke v. Board of Education, 215 Neb. 250, 338 N.W.2d 272 (1983).

2. The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.

a. Palo Verde School District v. Hensey, 9 Cal. App.3d 967, 88 Cal. Rptr. 570 (1970).

b. Golden v. Board of Education, 285 S.E.2d 665 (W.Va. 1982).

c. Board of Education v. Weiland, 179 Cal. App.2d 808, 4 Cal. Rptr. 286 (1960).

d. Clarke v. Board of Education, 338 N.W.2d 272, 215 Neb. 250 (1983).

B. Determinations of what "immorality" means must be tied to the school community and not decided in the abstract.

1. Jarvella v. Willoughby-Eastlake City School District Board of Education, 12 Ohio Misc. 288, 233 N.E.2d 143 (1967).

C. Teachers are role models for the students they teach and their conduct must be assessed in light of this role.

1. Ambach v. Norwick, 441 U.S. 68, 99 S. Ct. 1589 (1979).
2. Bethel School District v. Fraser, ___ U.S. ___, 54 U.S.L.W. 5054 (July 7, 1986).
3. Board of Trustees v. Stubblefield, 16 Cal.App.3d 820, 94 Cal. Rptr. 318 (1971).
4. Clarke v. Board of Education, 215 Neb. 250, 338 N.W.2d 272 (1983).
5. Chicago Board of Education v. Payne, 102 Ill. App.3d 741, 430 N.E.2d 310 (1st Dist. 1981).
6. Rowland v. Mad River School District, 730 F.2d 444 (6th Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 1373 (1985).

D. As a general rule courts give discretion to boards of education to determine what conduct does or does not constitute immorality.

1. Penn-Delco School District v. Urso, 33 Pa. Cmwlt. 501, 382 A.2d 162 (1978).
2. Bethel Park School District v. Krall, 445 A.2d 1377 (Pa. Cmwlt. 1982), cert. denied, 464 U.S. 851 (1983).
3. Weissman v. Board of Education, 190 Colo. 414, 547 P.2d 1267 (1976).
4. Cf. Bethel School District v. Fraser, ___ U.S. ___, 54 U.S.L.W. 5054 (July 7, 1986).
5. See also Clarke v. Board of Education, 215 Neb. 250, 338 N.W.2d 272 (1983).

E. A rule authorizing the discharge of a teacher for "immorality" is not unconstitutionally vague, especially if such a standard is applied only to conduct which substantially affects the teacher's continued ability to teach.

1. Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633 (1974).
2. Baker v. School District, 29 Pa. Cmwlt. 453, 371 A.2d 1028 (1977).

3. Bovino v. Board of School Directors, 32 Pa. Cmwlth. 105, 377 A.2d 1284 (1977).
4. Skripchuk v. Austin, 379 A.2d 1142 (Super. Ct. Del. 1977).
5. Weissman v. Board of Education, 190 Colo. 414, 547 P.2d 1267 (1976).
6. Kimble v. Worth County R-III Board of Education, 669 S.W.2d 949 (Mo. App. 1984), cert. denied ___ U.S. ___, 105 S. Ct. 331 (1984).
7. Clarke v. Board of Education, 215 Neb. 250, 338 N.W.2d 272 (1983):

"While we may not be able to fully and finally define immorality . . . , we can state that in order for a teacher's conduct to be immoral . . . such conduct must be directly related to a teacher's ability to teach, and indicate an unfitness to do so."

F. Courts have had occasion to discuss several different types of conduct engaged in by teachers which are alleged to be immoral. Because particular facts involved in a teacher termination case are sometimes determinative of the result, particular attention should be paid to the specific facts in each case.

1. Offenses involving alcohol.

- a. Horosko v. School District, 335 Pa. 369, 6 A.2d 866 (1939), cert. denied, 308 U.S. 553 (1939): Termination upheld of a teacher who ran a beer garden and in the presence of several of her students whom she was tutoring at the time took an occasional drink of beer and served beer to customers. This case also involved gambling activity by the teacher.
- b. Lindgren v. Board of Trustees, 558 P.2d 468 (Mont. 1976): The Montana Supreme Court overturned the termination of a teacher convicted of driving while under the influence of intoxicating liquor and driving without a valid driver's license on the basis that the school district failed to substantiate any causal relationship between these convictions and the performance of teaching duties. The court further found that as a matter of law such convictions are not tantamount to "immorality, unfitness,

incompetence, or a violation of the adopted policies of such trustees." On procedural grounds the court refused to reach the issue of whether an amended charge against the teacher would have been the sufficient ground for his termination. This amended charge included allegations concerning the connection between the convictions and his teaching.

- c. Williams v. School District, 4 Ariz. App. 5, 417 P.2d 376 (1966): The court upheld the termination of a teacher based upon his plea of guilty to the misdemeanor offense of disturbing the peace by being under the influence of intoxicants. The case did not involve statutory interpretation of the term "immorality." Rather it involved interpretation of a contractual provision requiring the teacher to adhere to any reasonable pattern of behavior accepted by the community for professional persons.

2. Gambling offenses.

- a. Horosko v. School District, 335 Pa. 369, 6 A.2d 866 (1939), cert. denied, 308 U.S. 553 (1939): The court upheld the termination of a teacher in part for her behavior in running a beer garden and in the presence of several of her students whom she was tutoring at the time, shaking dice with customers for drinks, and playing and showing customers how to play a pinball machine on the premises.
- b. Baker v. School District, 29 Pa. Cmwlth. 453, 371 A.2d 1028 (1977): The court upheld the termination on the ground of immorality of a teacher who pled nolo contendere to an illegal gambling charge.

3. Offenses involving misappropriation of public funds.

- a. In re Flannery's Appeal, 406 Pa. 515, 178 A.2d 751 (1962): The court upheld the termination of a teacher for immorality because of the teacher's conviction for misappropriating public funds.

4. Offenses involving deception.

- a. Board of Education v. Weiland, 179 Cal.App.2d 808, 4 Cal. Rptr. 286 (1960): The court upheld the termination on the ground of immorality of a teacher who had falsified attendance records for her class.
- b. Negrich v. Dade County Board of Public Instruction, 143 So.2d 498 (Dist. Ct. App. Fla. 1962): The court upheld the termination on the ground of immorality of a teacher who falsely stated on his application for employment and on a loyalty oath that he was a U.S. citizen.
- c. Appeal of Batrus, 148 Pa. Super. 587, 26 A.2d 121 (1942): The court upheld the termination on the ground of immorality of a teacher who lied on an application for a liquor license.
- d. Logan v. Warren County Board of Education, 549 F.Supp. 145 (S.D. Ga. 1982): The court upheld, in the face of claims of violating the teacher's Constitutional rights, the teacher's termination on the ground of committing an offense involving moral turpitude where the teacher submitted false documents to the Internal Revenue Service.
- e. Balog v. McKeesport Area School District, 484 A.2d 198 (Pa. Cmwlth. 1984): The court upheld the termination of the school district's director of vocational education on the ground of immorality under circumstances where the director made false statements to the superintendent and other district staff regarding his presence in an elementary school building during the time a burglary in that building was being investigated.
- f. Bethel Park School District v. Krall, 445 A.2d 1377 (Pa. Cmwlth. 1982), cert. denied, 464 U.S. 851 (1983): The court upheld the termination of a teacher on the ground of immorality where the teacher falsely reported that she was out ill when in fact she was attending a meeting unrelated to her teaching duties in another city.

- g. Bickford v. Board of Education, 214 Neb. 642, 336 N.W.2d 73 (1983): The court upheld the termination of a school guidance counselor on the ground of unprofessional conduct because the guidance counselor falsely reported to his principal that he had contacted all of the parents of students who were having academic difficulty. The principal had previously ordered the teacher to contact all of these parents.

5. Offenses involving assault.

- a. Skripchuk v. Austin, 379 A.2d 1142 (Super. Ct. Del. 1977): The court upheld the termination of a teacher on the ground of immorality based upon his conviction for felonious restraint, aggravated assault, theft by unlawful taking, and violation of the Uniform Firearms Act.

6. Offenses involving firearms violations.

- a. Skripchuk v. Austin, 379 A.2d 1142 (Super. Ct. Del. 1977): The court upheld the termination of a teacher on the ground of immorality based on his conviction for felonious restraint, aggravated assault, theft by unlawful taking, and violation of the Uniform Firearms Act.

7. Theft offenses.

- a. Skripchuk v. Austin, 379 A.2d 1142 (Super. Ct. Del. 1977): The court upheld the termination of a teacher on the ground of immorality based on his conviction for felonious restraint, aggravated assault, theft by unlawful taking, and violation of the Uniform Firearms Act.
- b. Kenai Peninsula Borough Board of Education v. Brown, 691 P.2d 1034 (Alas. 1984): The court upheld the termination of a teacher on the ground of engaging in conduct constituting a crime involving moral turpitude where the teacher unlawfully diverted electrical services to his property.
- c. Kimble v. Worth County R-III Board of Education, 669 S.W.2d 949 (Mo. App. 1984), cert. denied ___ U.S. ___, 105 S. Ct. 331 (1984): The court upheld the termination of a teacher for immoral conduct where the

teacher took money and property belonging to the school district.

- e. Hoagland v. Mt. Vernon School District, 95 Wash.2d 424, 623 P.2d 1156 (1981): The court overturned the dismissal for cause of a teacher who had been convicted of grand larceny by possession for having purchased a stolen motorcycle. The case was before the Supreme Court on the issue of the appropriateness of a motion for summary judgment in favor of the school district. The court held that it was improper to grant such a motion because there was a material factual issue yet to be decided. That material factual issue was whether the teacher's misconduct affected his fitness to teach.

8. Shoplifting.

- a. Lesley v. Oxford Area School District, 420 A.2d 764 (Pa. Cmwlth. 1980): The court upheld the termination of a teacher on the ground of immorality for shoplifting.
- b. Golden v. Board of Education, 285 S.E.2d 665 (W.Va. 1982): The court overturned the termination of a counselor ordered because of her plea of nolo contendere to a misdemeanor charge of shoplifting on the ground that there was no showing of a rational nexus between this conduct and the teacher's ability to perform her duties. Apparently the only evidence in the record before the Board of Education relating to fitness to teach was the favorable testimony of the teacher's fellow teachers and of her principal and assistant principal.

9. Use of racial epithets in class.

- a. Clarke v. Board of Education, 215 Neb. 250, 338 N.W.2d 272 (1983): The court upheld the termination of a teacher on the ground of immorality where the teacher referred during class to some of his black students as "dumb niggers."

10. Sexual misconduct outside of school.

- a. Ross v. Springfield School District, 716 P.2d 724 (Or. 1986): The court remanded for further proceedings before the Oregon Fair Dismissal Appeals Board the termination on

the ground of immorality of a teacher who engaged in homosexual activity in an arcade booth in an adult bookstore. The court remanded the case back to the FDAB because the FDAB erred in viewing as its task that of finding what community moral standards were. The court held under Oregon law that the FDAB had the responsibility to determine what was or was not immoral conduct without reference to public opinion.

- b. Sherburne v. School Board, 455 So.2d 1057 (Fla. App. 1 Dist. 1984): The court overturned an order terminating a teacher on the ground that she lacked good moral character, who admitted that at various times she lived in the same trailer with an adult male to whom she was not married and to whom she was not related by blood or marriage. The court refused to uphold the termination because there was no direct evidence of any sexual misconduct on the teacher's part nor any evidence of any harm to students from the teacher's cohabitation. The court specifically emphasized that there was no evidence of illicit sexual conduct on or about the school premises, or during any school activities or functions away from the school. Nor was there any evidence of any conduct involving a student, directly or indirectly, or any open lewdness or licentious behavior.
- c. Lile v. Hancock Place School District, 701 S.W.2d 500 (Mo. App. 1985): The court upheld the termination of a tenured teacher on the ground of immoral conduct because of the teacher's conduct regarding two young daughters of the woman he was living with. The teacher walked into the bathroom on several occasions while the girls were taking baths and on at least one occasion took nude photographs of them while they were in the bathtub. He also slept with the girls while their mother was in the hospital. The two girls were ages 6 and 10 when the teacher started living with their mother and were ages 10 and 14 when he slept with both of them.
- d. Sedule v. Capitol School District, 425 F.Supp. 552 (D. Del. 1976), aff'd without opinion, 565 F.2d 153 (3d Cir. 1977), cert denied, 434 U.S. 1039 (1978): The court

upheld against Constitutional challenges the termination of an assistant superintendent of schools on the ground of neglect of duty because of certain behavior on his part while he was having an affair with a married woman. The board had found him guilty also of immorality, but the court did not reach this issue. The assistant superintendent's relationship caused him to miss work and to engage in a sexual relationship with the woman during normal working hours. The court specifically refused to decide the issue of whether a continuing course of adultery could constitute a basis for dismissal from public employment.

- e. Rowland v. Mad River School District, 730 F.2d 444 (6th Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 1373 (1985): The teacher in this case was a high school guidance counselor who was terminated after announcing her homosexuality. The trial court found that her job performance had not been affected by her stated sexual preference. Nevertheless, the court found that the likelihood of some impact from a high school guidance counselor being known as homosexual could justify her termination.

11. Sexual misconduct that is school related.

- a. Downie v. Independent School District, 367 N.W.2d 913 (Minn. App. 1985): The court upheld the immediate discharge of a teacher for immoral conduct and conduct unbecoming a teacher because the teacher was involved in a weight loss bet with two ninth grade female students, the terms of which included sexual activities with the teacher, because the teacher repeatedly administered an oral survey to individuals and groups of junior high school students regarding their personal sexual activities, because the teacher used vulgar, crude, and inappropriate language in stories when speaking to students, and because the teacher breached the confidentiality he owed to a student whom he counseled.
- b. Board of Education v. Hunt, 138 Ill. App.3d 947, 487 N.E.2d 24 (1985): The court upheld the termination of a teacher for unprofessional and immoral conduct because the teacher admitted pinching three second grade girls on the buttocks.

- c. Fisher v. Independent School District, 357 N.W.2d 152 (Minn. 1984): The court upheld the termination of an elementary school principal on the ground of immorality for engaging in homosexual abuse of an elementary school boy.
- d. Kilpatrick v. Wright, 437 F.Supp. 397 (M.D. Ala. 1977): The court upheld against Constitutional challenges the termination of a teacher on the ground of immorality because the teacher made sexual advance toward female pupils in class, threatened a pupil with a loaded gun, and attempted to unzip a female pupil's pants in front of a class.
- e. Ricci v. Davis, 627 P.2d 1111 (Colo. 1981): The court upheld the termination of a male teacher for improper sexual conduct with four female students. The teacher's conduct included hugging and kissing some of the girls.
- f. Weissman v. Board of Education, 547 P.2d 1267 (Colo. 1976): The court upheld the termination of a teacher on the ground of immorality where the teacher touched and tickled female students on various parts of their bodies and occasionally between their legs in the proximity of the genital areas in the rear seat of a van during a field trip.

12. Possession of marijuana.

- a. Baker v. School Board, 450 So.2d 1194 (Fla. App. 5 Dist. 1984): The court overturned the dismissal of an elementary school teacher who had been terminated for possession of illegal alcohol and marijuana. The teacher had been criminally charged, but the criminal charges were subsequently dismissed. The court did recognize that other court decisions in Florida had held that possession of marijuana did constitute immorality. The court in this case decided that there was not substantial competent evidence that the teacher possessed the marijuana or the illegal alcohol. The court explicitly rejected a school board argument that even if there was insufficient evidence to prove possession of marijuana or illegal alcohol, the teacher should nonetheless be

dismissed because his effectiveness as a teacher had been impaired by the events surrounding the criminal charge.

- b. Chicago Board of Education. v. Payne, 102 Ill. App.3d 741, 430 N.E.2d 310 (1st Dist. 1981): The court upheld the dismissal of tenured teacher for conviction of possession of a small amount of marijuana, some three years prior to the adoption of the dismissal notice. The superintendent of schools was unaware of the conviction for marijuana possession until a subsequent arrest of the teacher. The court concluded that the prior conviction constituted sufficient cause for dismissal of the tenured teacher, finding that there would be an adverse impact on the general school population once this conviction became general knowledge.

- 13. Breach of confidentiality owed to a student being counseled.

- a. Downie v. Independent School District, 367 N.W.2d 913 (Minn. App. 1985): The court upheld the termination of a junior high school guidance counselor in part because the counselor on numerous occasions breached the confidentiality of students who came to him for counseling. The most offensive breach of confidentiality concerns the teacher's disclosure of an incest victim's confidences to teachers in a social setting who had no compelling professional need for such information.

- G. The standard of proof required in teacher termination hearings for dismissal of a teacher for immorality is the preponderance of the evidence standard.

- 1. Madril v. School District, 710 P.2d 1 (Colo. App. 1985): The court overturned the dismissal of a teacher for immorality. A female student was in the habit of entering the teachers classroom shortly before the end of class to meet a friend so that they could go to lunch together. Although the student testified that the teacher had made sexually explicit statements to her, the hearing officer found that what the teacher in fact said was "I know you are here for me and I know you are here to see me." The court concluded as a matter of law that this statement did not constitute substantial evidence of sexually provocative or exploitive conduct. In the course

of making this finding, the court held that the standard of proof in teacher dismissal proceedings is the preponderance of the evidence standard and not the beyond a reasonable doubt standard.

2. The Board of Education of the City of Chicago v. The State Board of Education, Ill.2d _____, N.E.2d _____ (June 6, 1986): The Illinois Supreme Court held that the proper standard of proof applicable to tenured teacher dismissal proceedings, including those for conduct that might constitute a crime as charged, is the preponderance of the evidence standard. The underlying facts in this case concerned a physical education teacher who allegedly hired a student to kill his principal and two assistant principals.

H. Coordination of teacher termination proceedings with on-going criminal proceedings.

1. The procedure in Massachusetts.

- a. By statute, Massachusetts provides as follows:

"An officer or employee of a county, city, town or district, howsoever formed, including, but not limited to, regional school districts and regional planning districts, or any department, board, commission or agency thereof may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointed public office, trust or employment at any time held by him, be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner. . . .

"Any person so suspended shall not receive any compensation or salary during the period of suspension. . . .

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension. . . ."

- b. Dupree v. School Committee of Boston, 15 Mass. App. 535, 446 N.E.2d 1099 (1983): The Appeals Court of Massachusetts held that a school teacher's indictment for possession with intent to distribute cocaine came within the terms of the above-cited statute because such conduct was, in fact, misconduct in office or employment within the meaning of the statute.
- c. Perryman v. School Committee of Boston, 17 Mass. App. 346, 458 N.E.2d 748 (1983): The Appeals Court of Massachusetts reached a similar conclusion regarding teachers who were indicted on welfare fraud charges.

2. New Jersey Procedure.

- a. Ott v. Board of Education, 160 N.J. Super. 333, 389 A.2d 1001 (1978): The Appellate Division of the Superior Court of New Jersey held that a teacher was not entitled to continued receipt of his salary during his suspension under the following circumstances. The teacher was charged with unbecoming conduct and temporarily suspended based upon his arrest for unlawful possession of marijuana and hashish. The teacher was advised of his right to file with the school board a sworn statement in opposition to the charge and was granted equitable relief restraining the school board from proceeding with the teacher termination hearings because of the potential prejudice to the teacher arising out of the dilemma of foregoing his defense in a disciplinary proceeding or risking self-incrimination in a criminal proceeding.

3. The impact of Cleveland Board of Education v. Loudermill, ____ U.S. ____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

- a. The United States Supreme Court held that the principle that under the due process clause an individual must be given an opportunity for a hearing before he is deprived of any significant property interest, requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.

- b. The Supreme Court also held that the pre-termination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against the mistaken decisions. This pre-termination hearing should determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential requirements of due process are notice and an opportunity to respond. The public employee with a property interest which was at stake in termination proceedings is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.
- c. In the course of reaching its decision, the Supreme Court specifically recognized that in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending him with pay.

II. SUGGESTED PROCEDURES FOR HANDLING AN INVESTIGATION OF ALLEGED SEXUAL MISCONDUCT BY A SCHOOL DISTRICT EMPLOYEE INVOLVING STUDENTS

- A. Standard operating procedure utilized by the School District of Omaha.
 - 1. A report is received at the building level of the alleged employee misconduct.
 - a. The building level administrator interviews the child and the child's parent.
 - i. The administrator should not interview the child without another school staff member being present.
 - ii. The administrator should not interview the child without the parent being present, if at all possible.
 - iii. The administrator should not let the teacher or other school employee know of the investigation and should caution the child and the parent not to inform the employee either.
 - iv. The administrator should secure a signed written statement from the

child and the child's parent specifying the alleged misconduct.

- v. The administrator should inform the child of the following:
 - (a) The seriousness of the charge.
 - (b) The School District will be supportive if it determines that the child's allegations are true.
 - (c) The school employee has certain rights guaranteed to him or her by our federal constitution and by state statutes.
 - (d) That the child or parent should inform the administrator immediately if:
 - (1) There is any additional contact from the employee; or
 - (2) Anything unusual occurs such as obscene or threatening telephone calls or strangers following the child or hanging around the house.
- vi. The administrator should inquire whether the child knows of any other students who have been involved with the school employee, or if the child suspects any other students as being involved.
- vii. The administrator should, if at all possible, get specific dates, times and places where the alleged misconduct occurred. These should be reflected in student's written statement.
- b. The building administrator should contact the Assistant Superintendent for Staff Personnel Services immediately concerning the following:
 - i. A full report of the alleged misconduct;

- ii. What child abuse reporting responsibilities the School District has, if any;
- iii. What responsibility, if any, the School District has to report the matter to the police; and
- iv. What further actions the building administrator should take, if any.

2. Central office procedures.

- a. The Assistant Superintendent for Staff Personnel Services should immediately contact the School District's attorney.
- b. The Assistant Superintendent should review the student's written statements and confer with the building administrator concerning them.
- c. The Assistant Superintendent should schedule a conference with the employee if the charges look credible. If the employee is represented by a union, the Assistant Superintendent should inform the employee that he has the right to bring a union representative along to the conference.
- d. At the conference, the Assistant Superintendent should confront the employee with the written statements. The Assistant Superintendent should have one other School District administrative employee present with him at this conference.
- e. The Assistant Superintendent or his designee should take notes on the employee's oral response to the charges.
- f. The Assistant Superintendent should offer the employee the opportunity for a written response. In fact, the Assistant Superintendent should encourage the employee to make a written response.
- g. If the employee is not represented by a union representative at the conference but is otherwise a member of the union, the Assistant Superintendent should suggest that the employee consult his or her union about the matter.

- h. If the employee is not represented by a union and is not a member of a union, the Assistant Superintendent should suggest that the employee seek legal counsel.
 - i. The Assistant Superintendent should, at some point, offer the employee an opportunity to take a polygraph exam.
 - j. The Assistant Superintendent should follow up on any leads from the child involved concerning other students.
 - k. The Assistant Superintendent should interview the child himself if the employee denies the charges against him and should also offer an opportunity to the child to take a polygraph exam. The School District's attorney should be involved in these interviews.
 - l. If the Assistant Superintendent determines that there is at least some credibility to the charges, he should suspend the employee with pay pending the results of his investigation.
 - m. The Assistant Superintendent should determine whether to contact the police or a social service agency concerning the allegations.
 - n. After completing the investigation, the Assistant Superintendent should make a decision concerning the employee's continued employment with the School District.
3. Preparation for a teacher termination hearing.
- a. See the materials in this outline concerning the administrative process for general guidelines concerning preparation for teacher termination hearings.
 - b. Special issues regarding terminations for immoral conduct with students.
 - i. The use of video tape depositions of the child: As a general rule, do not use such depositions unless there is specific statutory authorization for such use.

- ii. Preparation of a child witness.
 - (a) Involve the parent.
 - (b) Extra reassurance and extra review of the testimony are necessary.
- iii. The use of polygraph exams.
 - (a) The admissibility of polygraph examinations in state administrative proceedings depends on the law of each state.
 - (b) If there is any leeway in using polygraphs and the polygraphs are strongly supportive of your case, take the position that you will use these polygraph examinations in the hearing since use of such polygraphs may help to prompt a resignation prior to hearing.
- 4. The relationship between the School District and child abuse reporting agencies.
 - a. The primary interest to be served under these circumstances is to terminate the employee if the charges are, in fact, true. This interest supersedes wherever it is lawfully permitted to do so, School District responsibilities regarding reporting child abuse or reporting criminal law violations.
 - b. If the alleged misconduct falls within the statutory definition of child abuse which must be reported to proper authorities, the following procedures should be utilized:
 - i. If the parent has not yet reported this matter to the appropriate authorities, the Assistant Superintendent should report this matter once a decision is reached that the investigation is over and the conclusion of the investigation is that the employee did engage in sexual misconduct.
 - (a) Such a procedure avoids concurrent investigations by social service agencies which could interfere with the School

District's investigation of the matter.

- (b) The Assistant Superintendent should inform the parent and the child that this matter is being reported to the appropriate social service agency so that the parent and child are not surprised by this additional investigation. The Assistant Superintendent should inform the parent and child that their cooperation with the social service agency's investigation is appropriate.
 - ii. If the parent has already reported the alleged sexual misconduct to the appropriate authorities, the Assistant Superintendent should contact the social service agency to let the agency know the following:
 - (a) The School District is investigating the matter also.
 - (b) The School District's investigation will be carried out expeditiously.
 - (c) The School District's standard operating procedure is to suspend the employee with pay pending the conduct of the investigation, thereby substantially reducing the opportunity for the employee to be in contact with and further harm the child.
 - (d) The School District is requesting that the social service agency postpone the remainder of its investigation until the School District has completed its investigation.
5. The relationship between the School District and the police.
- a. The fact that the alleged misconduct may also violate the criminal laws does not alter the primary interest of the School District in securing the termination of the

employee who has engaged in sexual misconduct with students.

- b. If the parent has not yet reported the alleged misconduct to the police, the following procedures should be utilized:
 - i. The Assistant Superintendent should urge the parent to cooperate in the School District's investigation first and rely upon the School District to decide the appropriate time to involve the police.
 - ii. Once the Assistance Superintendent has completed his investigation and has concluded that the employee has engaged in criminal conduct, he should report the matter to the police concurrently with putting his recommendation of termination to the Board of Education in writing.
- c. The underlying problem caused for School District proceedings by criminal proceedings is the delay which criminal proceedings cause for teacher termination proceedings.
 - i. In order to avoid possible due process problems, the School District should pay the school employee until after the employee has had an opportunity for a due process hearing and a determination by the Board of Education regarding his or her employment.
 - ii. A School District due process hearing can be held up by criminal proceedings because the employee has a right both to a hearing on the Assistant Superintendent's recommendation of termination and also a right not to incriminate himself or herself and because the prosecutor and the police probably will not want to give the attorney for the employee in the criminal proceedings an opportunity for discovery and/or intimidation of their key witnesses prior to the criminal trial.
 - iii. If School District proceedings are held up by criminal proceedings, there is added cost to the School District

from paying the teacher during the pendency of the criminal proceedings.

- iv. If the School District proceedings are held up by the criminal law proceedings and the teacher is acquitted in the criminal proceedings, the acquittal introduces a strong element of ambiguity into any School District hearing despite the difference in the standard of proof between criminal proceedings and teacher termination proceedings.
- d. How to resolve this problem.
 - i. The Assistant Superintendent should communicate with the local police and with the local prosecutor concerning this problem.
 - ii. The Assistant Superintendent should try to persuade the police and the prosecutor to hold up their investigation until the School District's proceedings are completed. The Assistant Superintendent should inform the police and/or the prosecutor that in most cases of this kind the employee ends up resigning prior to any hearing.
 - iii. The Assistant Superintendent should inform the police and/or the prosecutor that the School District will proceed to hearing on the matter with dispatch.
- e. Proper procedures if the parent has already reported the alleged misconduct to the police at the time the School District commences its investigation of the matter.
 - i. The Assistant Superintendent should immediately contact the police and attempt to persuade them to postpone their investigation until the School District has completed its investigation.
 - ii. If the police agree to postpone their investigation, the Assistant Superintendent should proceed with his investigation as stated above.

iii. If the police do not agree to postpone their investigation, the Assistant Superintendent should proceed as follows:

(a) The Assistant Superintendent should continue his investigation simultaneously with the police investigation.

(b) The Assistant Superintendent and all School District personnel should be cooperative with the police.

(1) The Assistant Superintendent should avoid simultaneous interviews of witnesses with the police. This applies especially to interviews of the employee who is the subject of the allegations of sexual misconduct.

(2) The Assistant Superintendent should share with the police whatever information he obtains and urge the police to share information with him.

(3) Under these circumstances, the Assistant Superintendent's investigation may need to proceed somewhat more quickly than if the police had not already been contacted.

(4) Despite any suggestions to the contrary from the police, the School District should utilize its own polygraph examiner if it has a polygraph examiner in whom it has confidence.

iv. The Assistant Superintendent should let the parent and the student know the following:

(a) What the relationship is between the School District investigation and the police investigation.

- (b) What the separate responsibility of the School District is in conducting its investigation.
- (c) Why some interviews must be done separately.
- (d) That the School District is deeply indebted to the parent and the child for their willingness to come forward under these circumstances and that they are very important to the School District and that they are very courageous.

III. SUGGESTED PROCEDURES FOR HANDLING AN INVESTIGATION OF A SCHOOL DISTRICT EMPLOYEE ACCUSED OF A CRIME OUTSIDE THE SCHOOL SETTING.

A. Two types of situations are common.

- 1. The School District finds out about criminal misconduct after the employee has pled guilty to some misdemeanor, for example, shoplifting, DWI, or placing an illegal bet.
- 2. The School District finds out about the matter at the time the employee is arrested and charged with a crime.

B. Suggested procedures in those circumstance where the employee has already pled guilty to some misdemeanor at the time the School District administration learns of the misconduct.

- 1. As a general rule, there are no facts to investigate since the plea establishes the pertinent facts.
- 2. The problem in these situations is the appropriateness of school-related sanctions.
 - a. The first problem is what level of sanction is appropriate.
 - i. First there is the abstract issue of what sanction is appropriate for the particular offense. The following issues should be examined:
 - (a) Are there any statutory limitations on imposing a particular sanction?

- (b) Are there any contractual limitations on imposing a particular sanction?
- (c) Are there any court decisions which would limit the imposition of a particular sanction?
- ii. Second, it must be decided whether the recommended penalty is consistent with past penalties for similar offenses. If the proposed penalty is not consistent, the inconsistency should be justified because of a change in School District policy to get tougher with such offenses, because of the unique factual circumstances of the particular case, or because the offense is part of a more serious pattern of misbehavior by this particular employee.

b. The issue of whether any sanction is appropriate must also be addressed. As a general rule, a sanction is appropriate if and only if there is a demonstrated connection between the offense committed and the employee's responsibilities at school.

i. Teachers and administrators are role models for students. (See case law above.)

(a) Court decisions generally deal with the issue of the appropriateness of termination of employment in these situations rather than with the issue of the appropriateness of some lesser sanction.

(b) Examples for discussion:

- (1) Placing an illegal bet.
- (2) Shoplifting.
- (3) Driving while intoxicated.

ii. As a general rule, School District employees who are not teachers or administrators are not role models for students.

(a) The bottom line with respect to non-certificated staff members, however, in other respects is the same. That is, the School District may discipline such employees if the School District can demonstrate that the employee's misconduct had significant impact on the job responsibilities of the employee.

(b) Examples for discussion:

- (1) Driving while intoxicated as applied to a van driver.
- (2) Placing an illegal bet as applied to a cafeteria worker.

C. Suggested procedures in those circumstances where the School District administration learns of the alleged misconduct at the time the school employee is arrested and charged with a crime.

- 1. Investigation in this situation should be a central administrative responsibility.
 - a. The Assistant Superintendent should contact the School District's attorney before proceeding with the investigation.
 - b. The Assistant Superintendent should contact the police and/or the prosecutor regarding the following:
 - i. To obtain any information these sources will share with the School District.
 - ii. To inform the police and the prosecutor that the School District will be investigating this matter also and will share with them any additional information the School District discovers.
 - iii. To establish rapport with the individual police officers and prosecutors handling the case.
 - c. The Assistant Superintendent should investigate the alleged misconduct.

- i. The Assistant Superintendent should visit with any witnesses to the alleged misconduct.
- ii. The Assistant Superintendent should visit with the employee accused of the crime.
 - (a) The employee probably will not be willing to talk at this point.
 - (b) Nonetheless, it is critical that the Assistant Superintendent give the employee an opportunity to visit concerning the allegations against him or her.
- d. The Assistant Superintendent should decide whether to suspend the employee with pay pending the outcome of his investigation.
- e. The Assistant Superintendent should decide whether to proceed with termination now or await the outcome of the criminal prosecution.
 - i. Factors for the Assistant Superintendent to analyze in making this decision:
 - (a) The strength of the case against the school employee independent of police witnesses. For example, the Assistant Superintendent should determine whether there is any statement from the employee to the police that is critical to making out the case against the employee.
 - (b) Will the police witnesses cooperate with the School District at a hearing which would take place prior to the criminal trial?
 - (c) What will the impact of the School District's proceeding immediately to a hearing be on future school/police relationships?
 - (d) Will the community understand why the School District is deferring

to the criminal prosecution if that is the decision made by the School District?

- (e) What steps could the School District take to help its public understand why the School District is deferring to the criminal proceedings?
- (f) What are the costs in money from waiting for the criminal proceedings to be completed?
- (g) What are the dollar costs of proceeding now?
- (h) How quickly will the criminal case come to trial?
- (i) How likely is a resignation after a criminal conviction or plea of guilty?

THE NATIONAL LABOR RELATIONS ACT AS A
METAPHOR FOR STATE PUBLIC EMPLOYER LABOR
RELATIONS ACT ENFORCEMENT

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THE NATIONAL LABOR RELATIONS ACT AS A METAPHOR FOR STATE
PUBLIC EMPLOYER LABOR RELATIONS ACT ENFORCEMENT

I. Framing the Argument

- A. Pennsylvania Labor Relations Board v. State College
Area School District, 461 Pa. 494, 337 A.2d 262
(1975)

"... it does not necessarily follow that federal precedent relating to private employment is particularly helpful in resolving the difficulties arising in the public sector.

Although these decisions may provide some guidance, we are mindful of the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public employees. Distinction between the public and private sector cannot be minimized. Employers in the private sector are motivated by the profit to be returned from the enterprise whereas public employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible. The employer in the private sector is constrained only by investors who are most concerned with the return for their investment whereas the public employer must adhere to the statutory enactments which control the operation of the enterprise. We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experiences gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment."

- B. In re Appeal of Cumberland Valley School District,
483 Pa. 134, 394 A.2d 946 (1978)

"Appellee suggests that the line of cases defining the good faith obligation of employer and employee which the Board considered under the National Labor Relations Act is inapplicable because the National Labor Relations Act (NLRA) concerns private employment while Act 195 concerns public employment. However, the present case does not present a situation where there exists a meaningful difference in policy between the NLRA and Act 195.

To the contrary, both acts favor the collective bargaining process. Section 701 of Act 195 which defines collective bargaining is substantially identical to Section 151 of the National Labor Relations Act. In the past, when a provision of Act 195 is similar to NLRA, we have looked to federal decisions for guidance." (Omitting citations of cases concerning the following issues: (1) whether the contracting out of unit work constituted an unfair labor practice; (2) whether an employer display of anti-union animus combined with an insubstantial employer explanation for discharges was sufficient evidence of an unfair labor practice; (3) whether the Board's findings were supported by substantial evidence; and (4) defining the duty to bargain in good faith.)

- C. Fire Fighters v. City of Vallejo, 87 LRRM 2453 (Cal. S. Ct. 1974)

"The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize there are certain basic differences between employment in the public and private sectors, the adoption of legislation providing for public employment negotiations on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions. We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of the bargaining under the Vallejo charter."

- D. Public Employees Association v. Community College, 114 LRRM 2762 (Wash. 1982) (Discussing several options in determining the appropriate standard of review of state labor agency rulings, and selecting the NLRA model.)
- E. Recognizing that the NLRB has jurisdiction over, and applies its rulings to charitable organizations, handicap workshops, private schools and colleges, secular operations of religious organizations, etc.,

the NLRB analogy is fairly compelling where the statutory provisions are similar.

II. Specific Issues on which NLRB Law may well be followed

A. Subcontracting, unilateral change and transfer of work from one group of employees to another.

(1) Unilateral Changes

a. Cases requiring bargaining to impasse before unilateral changes are made in terms and conditions of employment.

1. NLRB v. Katz, 369 U.S. 736, 8 L. ED. 2d 230, 82 S. Ct. 1107 (1962).
2. Hinson v. NLRB, 428 F.2d 133 (8 Cir. 1970).
3. United Artists Communications, Inc., 274 NLRB No. 17 (1985), 118 LRRM 1353. (After impasse employer may make changes even though union, not employer, initiated mediation service notice.)
4. In re: PSSU, Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978) (No unilateral alteration of benefits during bargaining.)
5. Faculty Ass'n v. Central Michigan University, 100 LRRM 2401 (Mich. S.Ct., 1978) (Public employers may not make unilateral changes on mandatory subjects of bargaining.)

B. Zipper Clauses

- (1) Columbus & Southern Ohio Electric Co., 270 NLRB No. 95, 116 LRRM 1148 (1984) (Finding clear and unmistakable waiver in zipper clause and surrounding circumstances.)
- (2) Venango County Board of Assistance, 11 PPER 11223 (1980) (PLRB adopting NLRB law before Columbus, relying on C & C Plywood, 148 NLRB 414 (1967) aff'd 385 U.S. 421, and Unit Drop Forge, 171 NLRB 600 (1968).

C. Relocation or Elimination of Bargaining Unit Work

- (1) Complete and permanent cessation of operations;
Textile Workers Union v. Darlington
Manufacturing Co., 380 U.S. 263, 58 LRRM 2657
(1965).
- (2) Complete and permanent cessation of a program
by a public employer: Millcreek Township
School District, 7 PPER 91 (Pa. 1976).
- (3) Curtailment or change in bargaining unit
operations:
 - a. First National Maintenance Corp. v. NLRB,
452 U.S. 66, 107 LRRM 2705 (1981)
(Balancing test - comparison of benefit for
labor-management process and burden placed
on employer)
 - b. Otis Elevator Company, 269 NLRB No. 162,
115 LRRM 1281 (1984) (No duty to bargain
change in nature and direction of
significant facet of the business).
 - c. Curtailment of school janitorial services.
School Committee of Newton v. LRC, 117 LRRM
2836 (Mass. S. Ct. 1983)
- (4) Subcontracting
 - a. Fibreboard Corp. v. NLRB, 379 U.S. 203, 57
LRRM 2609 (1964).
 - b. Gar Wood - Detroit Truck Equipment, 274
NLRB No. 23, 118 LRRM 1417 (1985) (No duty
to decision bargain significant change in
nature of business, but must bargain
"effects").
 - c. PLRB v. Mars Area School District, 480 Pa.
295, 389 A.2d 1073 (1978) (Following
federal precedent).
 - d. School District v. Wayne Co. Circuit Judge,
90 LRRM 2615 (Mich. 1975).

III. Employee Entitlement to Representatives at Discipline Interviews

- A. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).
- B. Employee entitled to prior knowledge of the reason for the meeting and prior consultation with the union representative. Pacific Telephone & Telegraph Company, 262 NLRB 1034, 110 LRRM 1416, 262 NLRB 1048, 110 LRRM 1411 (1982), Enfd. 711 F.2d 134, 113 LRRM 3529 (9th Cir. 1983).
- C. Is reinstatement and back pay available as a remedy for Weingarten violation?
 - (1) Kraft Foods, Inc., 251 NLRB 598, 105 LRRM 1233 (1980).
 - (2) Illinois Bell Telephone Co., 251 NLRB 932, 105 LRRM 1236 remand 674 F.2d 618, 109 LRRM 3244 (7th Cir. 1982).
 - (3) Taracorp Industries, 273 NLRB No. 54 (1984).
- D. Does Weingarten rule apply to nonunion employees?
 - (1) Materials Research Corp., 262 NLRB 1010, 110 LRRM 1401 (1982).
 - (2) Sears, Roebuck & Co., 274 NLRB No. 55 (1985), reversing Materials Research.
 - (3) Slaughter v. NLRB, No. 85-3256 (3rd Cir. slip opinion dated June 27, 1986), DLR, 7/7/86, p. E-1.
- E. State law cases
 - (1) Dube v. Teamsters Local 597, 111 LRRM 2350 (Vt. S. Ct. 1981) (follows federal precedent on employee waiver of Weingarten rights).
 - (2) Social Workers Union v. Welfare Dept., 86 LRRM 2954 (Cal. S. Ct. 1974) (upholds employee rights to representation at interview which could lead to discipline, citing federal precedent).

IV. Communication with Employees during the Collective Bargaining Process

- A. United Technologies Corporation, 274 NLRB 163 (1985).
- B. Proctor & Gamble, Inc., 160 NLRB 334, 62 LRRM 1617 (1966).

V. Role of the Courts in Defining Scope of Labor Arbitration

- A. AT&T Technologies, Inc. v. Communications Workers, 54 USLW 4339 (1986).

"END-RUN" BARGAINING: LIMITS ON PUBLIC EMPLOYER COMMUNICATIONS WITH EMPLOYEES AND THE PUBLIC IN PENNSYLVANIA

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ABSTRACT

The duty to bargain in good faith requires the designated representatives of the parties to engage in negotiations at the bargaining table with the intent of reducing the agreement to writing. The employer is prohibited from directly negotiating with the employees and undermining the exclusive bargaining rights of the labor organization. Sometimes a party engages in "end-run" bargaining and attempts to use whatever political or institutional advantages it may have to secure an agreement where it might not have been able to do so at the bargaining table. In an effort to prevent "end-run" bargaining, some jurisdictions have restricted communications between persons other than the designated bargaining representatives by agency and court decisions or through legislation. This article examines the Pennsylvania Labor Relations Board's approach to dealing with a public employer that engages in end-run bargaining by appealing directly to employees or the public about the status of labor negotiations.

A public employer may deem it beneficial for various reasons to communicate developments in current labor negotiations to parties other than the negotiators representing the bargaining unit. For instance, the employer may feel that union negotiators are misrepresenting its good faith or that its "reasonable" proposals are not being conveyed to the members of the bargaining unit. Viewing union negotiations as an obstacle to settlement, it may wish to clarify its position or proposals by direct communications with employees. Alternatively, the employer may feel that the union is behaving unreasonably in matters involving

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either excessive public expenditures or potentially adverse effects on public welfare. In such cases, it may wish to alert the community that its interests are at stake and to provide it with the employer's perspective of the situation.

While the public employer may desire to make an appeal directed to employees or the public about the status of labor negotiations, that desire is often thwarted by the provisions of the law. Pennsylvania Public Sector Law [1], modeled after labor law for private employers on the national level, is designed in part to insulate employees from direct communications from their employer. Employees select a union precisely because they feel unqualified or incapable of representing their own interests, and they desire to select a spokesperson. For this reason, the law frowns on efforts by any employer, public or private, to circumvent the bargaining representative and speak directly to employees. Indeed, the United States Supreme Court has held [2]:

The very purpose of providing by statute for the collective agreement is to supersede the separate agreements of employees with terms which reflect the strength and bargaining power of the group.

An additional reason for strict scrutiny of communication directly to employees about negotiations is the desire of the Pennsylvania Labor Relations Board (PLRB or board) to insulate employees from attempts to undermine the union's status as exclusive representative of employees by directly or indirectly disparaging the efforts of the bargaining representative.

The legal pitfalls of direct communication to employees may apply equally to communications to the public, which have the inevitable effect of reaching employees. Statements in the media by a public employer may readily be viewed as thinly veiled efforts to appeal directly to employees. In any situation where a public employer seeks to communicate the status of collective bargaining, whether aimed directly to employees or to the public in general, the legal ramifications must first be considered.

COMMUNICATIONS DIRECTLY TO EMPLOYEES

While unions have taken the position that an employer should be prohibited from ever communicating with its employees about negotiations [3], the PLRB has refused to apply an absolute prohibition against such communication. The board has presumed to follow what it calls the private sector rule, that a communication is protected by the employer's right of free speech if it:

1. contains no direct or implied threats;
2. is a truthful discussion of fact and the lawful position of the employer; and
3. is surrounded by neither previous nor contemporaneous indications of union animosity [4-7].

These guidelines provide great flexibility and encompass various methods of communication, as well as a wide spectrum of information the employer may wish to relate to his employees. Letters to employees, notices placed on employee bulletin boards, and meetings of employees at the request of the employer may all be permissible tactics for use while negotiations are pending, so long as the employer is careful in conforming with the applicable standards set by the PLRB and the courts.

Unfortunately, PLRB guidelines also suffer from ambiguity, particularly when viewed in the context of the case law. For example, in *Northern Bedford School District* [8], the PLRB found an unfair labor practice when a school district disseminated to its employees the minutes of bargaining sessions with an attached statement of its bargaining position. Nothing in the decision in that case suggests that any threats, untruths or indications of union animosity were involved in the material disseminated. Yet the PLRB held [8, at 195]:

To afford public employees the full benefit and protection of the collective bargaining rights guaranteed to them by the Act, it is necessary to insulate them from any effort by the public employer, direct or indirect, to undercut the authority of the employee's duly selected representative, or fragment the unity of the bargaining unit. Any such action by the public employer is considered to be an unfair practice Obviously, the respondent did not fully understand the import of the Act or surely it would not have engaged in this conduct.

In *Northern Bedford*, it was not only the communication itself which provoked an unfair practice finding, but also the timing and frequency of the communication that led the board to gauge the totality of the school district's conduct and find that such conduct had the effect of undermining the representative status of the union. The legality of statements made to employees cannot simply be judged by the honest and truthful content of the statements. More important, perhaps, is the timing and frequency of those statements, the method of communication, and the totality of the employer's conduct in dealing with the union and employees.

The Timing of the Communication

Although not explicitly cited by the PLRB as a basis for its decisions, the board has been heavily influenced by the timing and frequency of a public employer's communication to its employees. Under public and private sector labor laws, both the purpose and the effect of an employer's action are carefully scrutinized to determine whether collective bargaining is being engaged in under principles of good faith. The importance of timing can only be explained through analysis of the role of the union in a collective bargaining process.

Labor law views the union as an agent representing the wishes and desires of a larger body of employees. The role of an agent is not only to speak on behalf of those employees, but of necessity involves the duty to keep employees informed

of the progress of negotiations. Viewed in that manner, collective bargaining is a process through which representatives of union and management meet with each representative having the duty to disclose the results of bargaining to the represented party or parties. Although an employer obviously has a legitimate concern that employees have accurate information about what occurs in bargaining, it is first and foremost the job of a union representative to tell that story to employees.

Under this collective bargaining model, an employer is not privileged to usurp the union's role by giving a blow-by-blow description of collective bargaining meetings or by bombarding the employees with information from the beginning of negotiations in order to evoke a sympathetic response. The PLRB is quite likely to view a pattern and practice of employer communications to employees that begins at the inception of bargaining as an infringement on the union's role as the employees' agent and an attempt to undermine that role. The PLRB does not deny that the employer has a legitimate expectation that its position will be transmitted to employees, but the case law strongly indicates that an employer must give the union a chance to present that position and must wait until reasonably late in the collective bargaining game to present its version of the facts directly to employees.

One of the most important factors in *Northern Bedford* was the PLRB's finding that on three occasions during contract negotiations, the school board issued a document entitled "Summary of Negotiations." The board apparently believed that the school district was attempting to manipulate the negotiating process by disseminating frequent bargaining information to influence unit members in favor of the school district's position. The PLRB is unlikely to permit the parties' primary focus to shift away from the bargaining table or to allow the process to deteriorate into a public relations battle.

It is safe to say that early communication with employees, while not *per se* improper, is fraught with risk, and the earlier the communication the less freedom the employer has to editorialize. In *Dallastown Area School District* [9], the district mailed a letter to employees early in the negotiating process, indicating in the letter that certain matters would be governed by the "administration handbook," and would not be the subject of contract negotiations. The matters referred to were indeed the subject of contract negotiations at the time the letter was sent. This type of communication on subjects which arguably were nonnegotiable may well have been permissible following a bargaining impasse, but the PLRB found that the letter violated the district's duty to bargain in good faith by undermining the bargaining representative, at least at the time it was sent. Similarly, the PLRB found in *Muhlenberg Township School District* [10], that the district committed an unfair practice during ongoing negotiations by communicating directly to employees a bargaining proposal which the union committee had already rejected. It is significant that this occurred in the middle of bargaining, and not after a bargaining impasse.

Approval of midnegotiation communications to employees has generally been limited to infrequent, factually neutral statements. In *Brownsville School District* [11], the PLRB approved the district's mailing of an accurate reproduction of its latest offer to the union. Even though the district added to the letter its belief that its offer was "equitable and generally liberal," the board approved it as factual and noncoercive.¹ Similarly, in *Fairview School District* [12], the PLRB affirmed that an employer may provide teachers with copies of its proposed collective bargaining agreement during negotiations. In that case, the proposed agreement included some matters that had already been agreed to in bargaining, along with other matters the union had rejected. These cases certainly indicate that midnegotiation communication is not prohibited, but must be infrequent, factual, and relatively free of attempts to persuade.

By contrast to its cautious approach to early communication, the PLRB has uniformly approved the right of a public employer to factually present and argue its position to employees at the close of negotiations. In *Bellefonte School District* [13], the school board distributed letters to its employees that contained the district's final offer following negotiations. The letters were mailed approximately two weeks after the last bargaining session. The final offer was to be presented to the membership and had not been rejected by the union. The letter was held not to constitute an unfair practice because its intent was to insure that the school district's employees were informed of the current status of negotiations in the district's hope that a settlement of the contract could be reached prior to the opening of schools. In *Williamsport Education Association* [14], the school board, in reply to letters from union members, wrote to its employees stating that its refusal to discuss salary increases at the bargaining table, leading to a breakdown in negotiations, was prompted by the union negotiator's refusal to alter his position on certain "nonnegotiable items," and to bargain in good faith. The PLRB, relying on *Proctor & Gamble, Inc.* [15], a private sector ruling, held that the employer's decision to inform employees of the status of negotiations or its version of a breakdown in negotiations was not alone enough to establish a failure to bargain in good faith. This ruling gives the employer substantial latitude and upholds the employer's right to communicate specific proposals to employees upon a breakdown or impasse in bargaining. In *Port Allegheny School District* [16], the superintendent wrote to all employees conveying in great detail the history of negotiations and reciting the board's final offer. The letter also informed employees of the union's expressed intent to present the final offer to the membership for a ratification vote. The superintendent's remarks were prefaced by an assurance that the letter was solely for informational purposes and was not to be considered pressure on employees to accept the offer. The PLRB not only sustained the superintendent's right to

¹ The letter was not approved in its entirety. The district invited employees to contact one of its representatives with questions concerning the letter. The board found this to be an improper invitation to bypass the union.

give a detailed history of bargaining, but also ruled that the superintendent was within permissible bounds of communications when he informed employees that if the offer was rejected an extended impasse could result, and stated his opinion as to the adequacy of the final offer in comparison to salaries at other school districts in the area.²

It is quite apparent that the permissible limits of direct communication vary significantly according to their timing. Particularly upon a breakdown or impasse, or at the close of negotiations, the PLRB will allow an employer broad latitude in communicating a final or latest offer to the employees. More important, it is then that the manner of reaching the final offer and the consequences of its rejection may also be discussed, at least if such information is conveyed in a noncoercive manner.

The Content of Communications

Assuming there is no objection to communication because of the timing or frequency, a public employer may freely discuss with the employees the employer's bargaining proposals [11], the employer's version of the reason for a breakdown in negotiations [14], the employer's bargaining position and the status of negotiations [16], and the details of the employer's final offer, including the consequences of an impasse [16]. All such communication must be carefully phrased, however, to avoid crossing the line from permissible communication to unlawful conduct under sections 1201(a)(1) and (5) of the Public Employee Relations Act.³ An employer can commit an unfair practice in numerous ways.

Overt efforts to undermine the union or its representatives — A flagrant example of impermissible efforts to erode the union bargaining authority occurred in *Lehigh County* [17]. There, late in the bargaining process, county representatives wrote two letters and had several direct conversations with bargaining unit employees. In the letters, among other things, the county explained to employees that the union "purposely kept you in the dark," and stated, "It is your district council representative's responsibility to keep you informed . . . He has not." The county expressed open disbelief of statements by union representatives and accused local and international union officials of being "derelict in the performance of their responsibilities . . ." In addition to

² In reaching this conclusion, the PLRB also relied on the fact that the recipients of the letter were college graduates capable of understanding it. Whether the level of sophistication of the unit will be a factor in future cases remains to be seen.

³ These Sections read as follows:

Section 1201. (a) Public employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act . . . (5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

other direct dealings with employees, the county discussed implementation of a pay plan with employees without union officials present. The PLRB had no trouble in concluding that the county, by this conduct, sought to unlawfully undermine and diminish the union's status as exclusive bargaining agent for the employees affected.

Even the use of mildly antagonistic language in a direct attempt to persuade employees to accept an offer over which there was an impasse may violate the law. Unlike the communication in *Brownsville School District*, where the employer merely characterized its offer as "equitable," the employer in *Westchester School Board* [18] mailed a letter, the stated purpose of which was to induce employees to accept the employer's contract offer. Furthermore, it used language such as: "Surprisingly, the association negotiators again turned down the offer." The PLRB held that this "antagonistic" language was an attempt "to fragment the unity of the bargaining unit" in violation of Section 1201(a)(5) of the act.

Invitations to deal directly with the employer – In *Brownsville School District* [11], as part of an otherwise lawful communication, the employer invited employees to contact the district if there were any questions concerning the letter. This seemingly innocuous invitation transformed an otherwise acceptable communication into an unfair practice under Section 1201(a)(5). Similarly, the presentation of an offer directly to employees, which has not previously been presented at the bargaining table, no matter how nonadversarial the communication, will be considered a subtle effort to undermine the bargaining agent and a violation of the act. A similar result is likely if the employer presents employees with a rejected offer, as was done in the *Muhlenberg Township School District* case, unless it is a rejected "final offer" on which employees are expected to vote.

Incomplete disclosure or misrepresentation of issues – A direct communication from the employer to employees while negotiations are pending must be a truthful discussion of facts and of the lawful position of the employer under the circumstances. In *Forest Hills School District* [19], the PLRB held that a school district's dissemination of literature to union members which misrepresented the bargaining position of the parties at impasse violated section 1201(a)(1) of Act 195 where:

1. documents contrasting initial union position and final school district position created an unreasonable image of the union stance; and
2. the misrepresentation undermined the union's bargaining position.

In *Baldwin-Whitehall School District* [20], a school district's distribution of information to individual bargaining unit members following union rejection of a final offer violated the act where:

1. the statement disseminated ignored several unresolved issues, and
2. the mailing indicated the school district's attempt to circumvent the bargaining process.

Finally, the incomplete disclosure of information regarding negotiations in the *Westchester School Board* case, in addition to the antagonistic language used, contributed to the finding of a violation.

Failure to communicate the finality of an offer – In a number of cases, the PLRB has either commented favorably or appeared to give favorable consideration to the fact that an offer presented in a letter to employees was a final offer and that no other offer was expected to be made (e.g., [13]). The PLRB is likely to follow the private sector model in holding that an employer must communicate the "finality" of its offer at the bargaining table if it wishes to present the offer as "final" in a subsequent communication to employees [21].

The Method of Communication

Few clear guidelines have emerged from the cases indicating what the limitations may be on methods of communicating with employees. The only serious challenge mounted to employer communications practices took place in *City of Lancaster* [22]. There, the PLRB found no refusal to bargain where the employer called two mandatory meetings with employees in order to explain its bargaining position, even though the employer refused to allow the union representative to participate in the meetings. No attempt was made by the employer to negotiate directly with the employees concerning matters which were still in dispute, although collective bargaining had reached an impasse. The PLRB reviewed numerous private sector decisions to conclude that a variety of communication methods were appropriate. Among those decisions were cases which held that the posting of a notice on a company bulletin board setting forth the status of negotiations was not an interference with employee rights [23], and the sending of a letter to each employee was not an attempt to bypass the union [24]. Another affirmed the right of an employer to hold a "captive audience" speech during a bargaining impasse without granting equal time to the union [25].

In *Centennial School District* [26], the union charged that the board of school directors violated the act by announcing at a public meeting that schools would be open despite a teachers' strike and that teachers who worked would be paid under the terms and conditions of the expired agreement. Concluding that there were no misrepresentations about bargaining, and that the employer was free to conduct its business during a strike, the PLRB held this to be permissible conduct.

Any form of employee communication appears to be permissible, so long as the timing is appropriate and the content is lawful. The most perilous form of communication is certainly the holding of direct, face-to-face meetings with small groups or individual employees. While not *per se* illegal, the tendency is for such talks to be "discussions" of matters under negotiation. Among the mistakes made by the employer in *County of Lehigh*, were individual and small

group discussions in which employees were asked whether they would walk out and during which a county official expressed his discontent with a union representative. Avoidance of informal discussions is by far the most prudent course of action.

Conclusions

In a perfect world, all union representatives would keep their members informed of the progress of negotiations, accurately characterize the employers' proposals and bargaining positions, and permit employees to make a fully informed decision on whether to accept or reject contract proposals. Experienced negotiators know that all is not perfect. There could be no quarrel with the proposition that a strike is more likely to occur if employees are ill-informed about the employer's position, and it is in the best interests of every employer to initiate communications if there is the slightest doubt that the bargaining unit is informed. At the same time, contact with the bargaining unit must be coordinated from the top and carefully conceived.

There are no cases in Pennsylvania which give any meaningful guidance on the beginning of this process, but certainly an employer cannot be prohibited from publicly disseminating general information about budgets or operating concerns during the months preceding bargaining to create a framework for future communication. Direct communication about bargaining early in the process, however, is probably inappropriate. The PLRB is likely to look with disfavor upon frequent communication, and information conveyed at later stages will have greater impact with less risk. Ordinarily, a public employer can probably be safe by communicating bargaining proposals once during the middle stages of negotiations and again when an impasse has been reached or a final offer has been presented. If the union committee has accepted an offer, this is probably unnecessary. Absent acceptance, the employer should carefully consider the best method of communication so that a fair, accurate portrayal of negotiations and the final proposal can be presented in the most attractive way without leaving the door open for charges of undermining the union or negotiating directly with employees.

COMMUNICATIONS WITH THE GENERAL PUBLIC

In many cases, either before or during a collective bargaining impasse or strike, a public employer may deem it advisable to generate public support by informing the public of the facts surrounding negotiations. Such action may take the form of communication via the mass media, including articles, editorials, and even paid advertisements in a local newspaper. Appearances on radio talk shows, features on television news programs, or communications in public forums, such as public meetings or assemblies, may also be considered.

There is a question, however, as to what the public employer may say and as to how it may be said in the process of informing the public, a question which

has apparently never arisen before the PLRB or the Pennsylvania courts, as research reveals no cases treating it directly. No decisions in the private sector are of much help, nor could they be deemed controlling. The rights of the general public are much greater and the public interest more obvious where public employee bargaining is concerned. As cases arise, the PLRB will be expected to account for different priorities and relationships among the parties than those which exist in the private sector.

It can be argued that since the public employer is generally accountable to the public for its actions and the employees are paid with public monies, the public has a right to complete information concerning negotiations. This is particularly true during an impasse or strike, at which time the public welfare may be directly and adversely affected. Legislatures in other jurisdictions have recognized this inherent right of the public. Several states, by statute or judicial decision, provide for "sunshine" bargaining with public employees either as a mandate (e.g., Florida, Kansas, Tennessee, and Minnesota), or by agreement of the parties (Massachusetts). Other states have provisions under which the parties have the duty or the right to inform the public concerning negotiations or bargaining proposals (e.g., California and Iowa).

The right of the employer and the union to inform the public concerning negotiations, particularly during an impasse or a strike, is tenable. The specificity of the information and the manner in which it is presented to the public must be considered, however, within the framework of Act 195. The purpose of the act is, in part, "to promote orderly and constructive relationships between all public employers and their employees subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare" [27]. Compliance with this purpose may, in the aforementioned situations, necessitate that the public be informed. The limits to which this information may extend, however, must be governed by § 1201 of the act.

For the same reasons direct communications to employees may constitute coercion or refusal to bargain in good faith (attempts to undercut the authority of the bargaining representatives or to fragment the bargaining unit), so also may communications to the public at large violate § 1201(a)(1) and (5) of the act. Any communication that reaches the public also reaches the individual employees, albeit through a different medium. In a number of states with public employee bargaining statutes (Iowa, Maine, and Massachusetts), insistence on public bargaining or disclosure of complete bargaining information has been held to be an unfair practice [28-30]. Communications to the public are also capable of arousing the ire of an entire community against one or both of the parties involved, resulting in greater pressure on the union. These factors may suggest that the standards concerning communications to the public should be at least as stringent as those applicable to direct communications by employers to their employees. On the other hand, public communication does not usually

invite employees to deal directly with the employer, one of the principal vices of direct contact with employees, nor need it be addressed directly to employees as an appeal to agree with the employer. For those reasons, a less stringent standard may be appropriate.

While every public employer should consider keeping the public informed during bargaining, indeed playing to public opinion to gain an advantage in the event of a strike, it must be recognized that the PLRB and the courts will balance the competing interests of the public on one hand and of employee rights under Act 195 on the other. Each communication must be examined to determine whether it is accurate, whether it serves a legitimate public purpose, and whether it can be issued in a manner less destructive of employee rights.

It certainly is not an unfair practice to make public pronouncements of a final offer or intent to offer continued work during a strike [26]. Indeed, the PLRB is likely to approve any public statement that could be made permissibly if spoken directly to employees.

More troublesome is an effort by the employer to vigorously defend its bargaining position or disparage the position of the union. May an employer say to the press what it could not say directly to employees? A truthful, well-documented attack on the union's bargaining position designed to garner public support may well pass legal muster, particularly if unaccompanied by direct appeals to employees to abandon the union stance. Misrepresentations, omissions, and unnecessarily inflammatory statements most assuredly will meet with disfavor. All public utterances about bargaining must be planned as part of the employer's complete strategy, coordinated through and approved by the negotiator, and issued only after careful thought as to the consequences of a charge before the PLRB.

REFERENCES

1. Public Employee Relations Act, Act of July 23, 1970, P.L. 563, No. 195, as amended, 43 P.S. § 1101.101 et seq.
2. *J. I. Case Company v. NLRB*, 321 U.S. 332, 14 LRRM 501 (1944).
3. See, e.g., *Centennial School District*, 9 PPER ¶ 9085 (1978).
4. *Portage Area School District*, 7 PPER 325 (1976).
5. *Reading School District*, 7 PPER 174 (1976).
6. *NLRB v. Hobart Brothers Company*, 372 F. 2d 203, 64 LLRM 2289 (6th Cir., 1967).
7. *Elwell-Parker Electric Co.*, 75 NLRB 1046, 21 LRRM 1120 (1948).
8. 7 PPER 194 (1974).
9. 6 PPER 243 (1975), *aff'd*, 7 PPER 245 (1976).
10. 7 PPER 286 (1976).
11. 2 PPER 197 (1972).
12. 11 PPER 11199 (1980).
13. 3 PPER 26 (1973).

14. 6 PPER 57 (1975).
15. 160 NLRB 334, 62 LRRM 1617 (1966).
16. 7 PPER 30 (1976).
17. 11 PPER ¶ 11115 (1980).
18. 3 PPER 75 (1973).
19. 2 PPER 203 (1972).
20. 2 PPER 165 (1972).
21. See, *NLRB v. Movie Star, Inc.*, 361 F. 2d 346, 62 LRRM 2234 (5th Cir., 1966).
22. 2 PPER 132 (1972).
23. *Ralston Purina Company*, 51 NLRB 769, 12 LRRM 298 (1943).
24. *J. E. Cote*, 101 NLRB 222, 31 LRRM 1250 (1952).
25. *Harcourt and Company, Inc.*, 98 NLRB 142, 29 LRRM 1439 (1952).
26. 9 PPER ¶ 9085 (1978).
27. 43 Pa.C.S.A. § 1101.101.
28. *Iowa, In re Burlington Community School District* (PERB 1976), Case No. 840.
29. *Maine, Municipal Employees Labor Relations Act*, Section 965(1)(c).
30. *Massachusetts, Town of Winchendon* (MLRC 1976), Case No. MUP-2527.

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EMPLOYMENT-AT-WILL

* * *

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I. HISTORICAL PERSPECTIVE

- A. In Adair v. United States, 208 U.S. 161 (1907), the United States Supreme Court adopted the employment-at-will rule.
- B. General Rule is an employer may terminate "at-will" an employee for any reason.
- C. The rule established that in the absence of a fixed-term contract, unlawful discrimination, or a specific constitutional right, a discharged employee has no recourse against his or her employer. Brooks v. Trans World Airlines, 574 F.Supp. 805, 808 (D. Colo. 1983).
- D. The employment-at-will doctrine has had a harsh effect on employees. Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959).
- E. At least twenty-nine states have granted some form of common law exception to the at-will doctrine.

II. EXCEPTIONS TO EMPLOYMENT-AT-WILL

A. Public Policy Exception

A public policy cause of action is the most widely recognized exception to the at-will doctrine. Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353 (1978); Bender Ship Repair, Inc. v. Stevens, 379 So.2d 594 (Ala. 1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980).

- 1. The Supreme Court of Illinois addressed the issue of what constitutes "clearly mandated public policy," in Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876 (1981).

II. EXCEPTIONS TO EMPLOYMENT-AT-WILL

A. Public Policy Exception (continued)

The court held that a discharged employee who had given police information about alleged criminal conduct of a co-worker outside the work place was entitled to protection from the at-will rule: Even though "no specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, . . . public policy favors citizen crime-fighters."

2. On the other hand, no cause of action for wrongful discharge has been recognized when the employees who "blew the whistle" were uncertain of their facts or were personally opposed to their employer's conduct. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).
3. At least one court has recently taken the position that an employee who fails to blow the whistle when he objects to a company practice, thereby acquiescing in it, cannot later claim his discharge was wrongful. Newton v. Bowen & Root, 658 S.W.2d. 370 (Ark. 1983).
4. A leading case recognizing a public policy exception to the at-will doctrine is Peterman v. International Brotherhood of Teamsters 396, 174 Cal.App.2d 184, 344 P.2d 25 (1959).

In Peterman, the court held a labor union that had terminated an employee because he refused to perjure himself before a state legislative committee liable for wrongful discharge.

The court reasoned that perjury is a crime and that the policy of the penal code, as well as the interest in the honest administration of public affairs, would be impaired seriously if an employer could terminate an employee for refusing to commit perjury. In more recent decisions similar reasoning has been used to allow a cause of action where employees were fired for refusing to violate a specific statute. Sheets v. Teddy's Frozen Foods, 179 Conn. 471, 427 A.2d 385 (1980), (insisted that the employer comply with State Food, Drug and Cosmetic Act).

II. EXCEPTIONS TO EMPLOYMENT-AT-WILL

A. Public Policy Exception (continued)

5. An employee's exercise of certain legal rights and privileges and subsequent wrongful discharge may lead to a cause of action based upon public policy grounds. A common example is the discharge of an employer for pursuing a claim under the worker's compensation laws. Murphy v. Topeka - Shawnee County Dept. of Labor Services, 6 Kan.App.2d 488, 630 P.2d 186 (1981).

Courts have found such dismissals actionable based on the rationale that it would vitiate the public policy expressed in the worker's compensation law.

B. Good Faith and Fair Dealings Exception

This theory allows a tort action for a breach of the covenant of good faith and fair dealing that is implied in a contract. It has the advantage of allowing recovery for pain and suffering as well as punitive damages in extreme situations. Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Cleary v. American Airlines, Inc., 111 Cal.App.3d 443, 168 Cal. Rptr. 722 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

1. Courts willing to recognize an implied covenant of good faith have placed limits on the applicability of the doctrine. Cleary v. American Airlines, 111 Cal.App.3d 443, 168 Cal. Rptr. 722 (1980).

In Cleary, the plaintiff was discharged after 18 years of employment with the defendant. He alleged that the discharge violated both an express policy of the company regarding employee grievances and the implied covenant of good faith and fair dealing. The court agreed:

[T]ermination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. Id. at 455 168 Cal. Rptr. 729.

II. EXCEPTIONS TO EMPLOYMENT-AT-WILL

B. Good Faith and Fair Dealings Exception (continued)

Also, in Pugh v. See's Candies, Inc., the court held that the employer's conduct gave rise to an implied promise that he would not act arbitrarily in dealing with his employees. The existence of such a promise could be implied by the jury from factors such as the length of plaintiff's employment, the promotions and recommendations he had received, and the absence of criticism of his work.

2. In a number of states, courts have flatly refused to imply covenants of good faith and fair dealing in employment-at-will contracts. Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (1980); Scholtes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D. Ark. 1980).
3. The Illinois Appellate Court, in Martin v. Federal Life Insurance Co., 109 Ill.App. 3d 596, 440 N.E.2d 998 (1982), declined to recognize a tort remedy based on a breach of an implied covenant of fair dealing for an employee of 22 years who was allegedly terminated without notice and without being accused of any wrongdoing, poor performance, or incompetence.

The court seemed to imply that in order to sustain a tort remedy for breach of an implied covenant of fair dealing, the employer's conduct must be extreme or outrageous, such as might give rise to a tort for the infliction of emotional distress. Martin at 1006.

The courts who reject an independent tort action based on implied covenant of fair dealing argue that it is necessary because of the practical difficulties in factually determining whether there was a breach of an obligation of good faith. Such a determination would be particularly difficult with respect to decisions to terminate management level employees whose performance is normally assessed according to subjective standards such as leadership, credibility, and loyalty.

II. EXCEPTIONS TO EMPLOYMENT-AT-WILL (continued)

C. Employee Manual Exception

Employers in the past had no obligation to follow the procedures set out in personnel manuals and employee handbooks. Johnson v. National Beef Packing Co., 220 Kan. 52, 54-56, 551 P.2d 779, 781-83 (1976); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 314-15, 299 N.W.2d 147, 151 (1980).

1. There are still courts which do not allow exceptions for employment manuals. For instance, in Heideck v. Kent General Hospital, Inc., 446 A.2d 1095 (Del. 1982), the court held that an employee information booklet, disseminated during the plaintiff's employment, did not alter the plaintiff's at-will status. Id. at 1097.

Similarly, in Ruch v. Strawbridge & Clothier, Inc., 567 F.Supp. 1078 (E.D.Pa. 1983), an information booklet disseminated to new employees, which contained rules and regulations pertaining to employee conduct, was held to be merely a "general code of conduct" and not a contract of employment. Id. at 1080.

2. A number of states have held that an employer's oral representations regarding such things as job security and employee disciplinary procedures and other representations contained in employee manuals constitute binding contracts, supplanting the at-will agreement, and thus limiting the employer's absolute right to discharge an at-will employee. Conley v. Board of Trustees of Grenada County Hospital, 707 F.2d 175 180 reh. den., 716 F.2d 901 (5th Cir. 1983); Hammond v. North Dakota State Personnel Board, 345 N.W.2d 359 (N.D. 1984).
3. The leading case in this area is Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980), in which the Supreme Court of Michigan upheld a jury verdict for a plaintiff, an employee-at-will, who claimed he had been discharged without just cause in violation of his employer's personnel manual. When hired, the employee inquired about job security, and representations were made that the job would exist as long as each employee "did his job." The employee was given a written policy manual which reinforced the oral assurances of job

II. EXCEPTIONS TO EMPLOYMENT-AT-WILL

C. Employee Manual Exception (continued)

security. The manual stated that "it is company policy to release employees for just cause only." Id. at 884. The court concluded that when a prospective employee inquiries about job security and is given assurances, a fair construction is that the employee may be discharged for good cause only.

Many jurisdictions have followed Toussaint's reasonable expectation rationale. None the less, Toussaint simply uses an estoppel argument, invoking the idea of reliance. Id. at N.W.2d 893.

4. In contrast, the Supreme Court of Kansas held, in Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976), that "The Policy Manual was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly no meeting of the minds was evidenced by the employer's unilateral act of publishing company policy." Id. at 55, 551 P.2d at 782.
5. Other courts, for a variety of reasons, have denied contractual causes of action to at-will employees allegedly discharged in violation of oral assurances and personnel manuals. In Mau v. Omaha National Bank, 207 Neb. 308, 299 N.W.2d 147 (1980), an offer of a "steady job" and a promise of a raise in three months were not enough to overcome the presumption that the employment for an indefinite term was terminable at will.

III. CURRENT DEVELOPMENTS IN THE LAW

- A. Under unilateral contract analysis, the promises and benefit found in employee handbooks will become part of an at-will employment contract if the following conditions are met:
 1. The promises found in the handbook are specific enough to constitute an offer;
 2. the offer is communicated by the distribution of the handbook to the employee;

III. CURRENT DEVELOPMENTS IN THE LAW (continued)

3. the employee who is generally aware of the company policy accepts the offer found in the handbook by commencing work or continuing to work;
4. by commencing work or continuing to work while retaining the freedom to quit, the employee provides consideration sufficient to make a unilateral offer binding.

Unilateral Contract Analysis has recently been applied to an employee handbook case by the Supreme Court of Minnesota in Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

The court stated that just as a promise of employment on particular terms of employment of unspecified duration may be a binding unilateral contract, if in the form of an offer and accepted by the employee, so may handbook language create a binding unilateral contract. Id. at 626-27.

Although Pine River dealt with a newly introduced handbook modifying the pre-existing employment-at-will contract, the court made it clear that a handbook offered at the time of hiring can also be an enforceable unilateral contract.

B. Legislative Reform

1. Arbitration clauses.

IV. CONSIDERATIONS FOR SCHOOL DISTRICTS

- A. Review all school handbooks, manuals and other documents.
 1. These documents should be carefully examined for any language that could imply a contractual relationship where none is intended.
 2. Review any language that might assure certain job security rights such as a formalized probationary period.

IV. CONSIDERATIONS FOR SCHOOL DISTRICTS (continued)

B. Disclaimers

1. Disclaimers should be used in addition to, and not in lieu of, revising documents of language of implicit job security promises.
2. A disclaimer should be written very carefully because a disclaimer that is written in harsh legalese may alienate your employees, and jeopardize your employment relationship.
3. If the district does distribute some type of employee manual to its employees a form may be used to summarize the prominent features of employment rules and benefits while serving as acknowledgment of receipt of the manual by the employee.

C. Oral Promises

1. Those involved in interviewing should be specifically instructed to be careful not to oversell the district.
2. All job offers should be in writing and contain at-will language or other language that will protect the district from possible litigation.

D. Performance Appraisals

1. Regular appraisals of employee performance are highly recommended to districts wishing to avoid unjust dismissal charges.
2. Appraisals also constitute objective, documented proof of unsatisfactory performance, and will help to establish just cause for a dismissal.
3. Supervisors should be instructed on the importance of an evaluation.

E. Work Rules

1. Work rules should be properly drafted, communicated and enforced.
2. Work rules can help the employer justify a dismissal by establishing an objective, good faith reason for termination.

**EROSION OF THE EMPLOYMENT-AT-WILL DOCTRINE:
CAUTIONS FOR SCHOOL DISTRICTS**

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I. INTRODUCTION

A legal topic which has recently captured the public's eye and gained media attention is the discharge of the employee who is employed at will. It has been a well-settled principle of common law in this country that an employee who is hired for an indefinite period of time without an employment contract is terminable at will by the employer without restriction. The general rule that an employee "at will" may be terminated for any reason is expressed in the often-quoted passage:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause and for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-19 (1884), overruled on other grounds.

However, the employment-at-will doctrine has had a harsh effect on employees. See, e.g., Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (employee-at-will discharged after 45 years of satisfactory performance when he was only one year away from retirement); Bell v. Faulkner, 75 S.W.2d 612 (Mo. Ct. App. 1934) (employee-at-will dismissed for refusing to vote for a political candidate supported by employer). It has long been the rule that in the absence of a fixed-term contract, unlawful discrimination, or a specific constitutional right, a discharged employee has no recourse against his or her employer. Brooks v. Trans World Airlines, 574 F. Supp. 805, 808 (D. Colo. 1983) Because of the doctrine's unfairness to employees, many commentators have criticized the doctrine while at the same time the courts have eroded it. As of 1983, twenty-nine states had granted some form of common law exception to the at-will doctrine, while others have strongly indicated that they will recognize an exception in an appropriate case.

These states have limited the traditional doctrine by creating exceptions

which provide employees with rights based on public policy, contract, and covenants of good faith and fair dealings. Being employers, this trend has significant ramifications for school districts in terms of rights, duties, and related employment costs. These developments have surfaced partially because of employee concern about job security in the wake of recent economic conditions. This trend will impact numerous areas of the school employment relationship, including advertising for applicants, interviewing, the hiring process, promotion, compensation, discipline, and termination of the district employee. It must be noted that certain employees such as teachers are protected by the teacher due process act and other various statutes. However, as discussed below procedures and rights incorporated in district policies and memoranda may provide the employee with additional contractual rights.

II. MODERN DAY APPROACH TO THE EMPLOYMENT-AT-WILL DOCTRINE.

In recent years there has been a steady erosion and an apparent dissatisfaction with the common law at-will rule. Due to the possible harsh results, courts have acknowledged a need to modify the rule. The trend has been to recognize a variety of exceptions to the traditional employment-at-will rule. Basically these exceptions fall into three broad categories. The most widely accepted approach is the "public policy" exception, which permits recovery upon a finding that the employer's conduct undermined some important public policy. Under the second exception, courts have found in the employment contract an implied-in-law covenant of "good faith and fair dealing" and have held employers liable in both contract and tort for breach of that covenant. Finally, the third exception based on contract, requires proof of an implied-in-fact promise of employment, as found in the circumstances surrounding the employment relationship, including all procedures and assurances in employer personnel manuals or memoranda.

A. Public Policy Exception

The public policy cause of action is the most widely recognized exception to the at-will doctrine. A majority of courts have recognized an exception on public policy grounds. In an often-cited decision the Supreme Court of Illinois in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) addressed the issue of what constitutes "clearly mandated public policy." The court stated:

In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows a matter must strike at the heart of a citizen's social rights, duties and responsibilities before [an action] will be allowed.

Id. 421 N.E.2d at 878-79

The leading case recognizing a public policy exception to the at-will doctrine is Petermann v. International Brotherhood of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). In Petermann the court held a labor union which had terminated an employee because he refused to perjure himself before a state legislative committee liable for wrongful discharge. The court reasoned that perjury is a crime and that the policy of the penal code, as well as the interest in the honest administration of public affairs, would be impaired seriously if an employer could terminate an employee for refusing to commit perjury. In more recent decisions similar reasoning has been used to allow a cause of action where employees were fired for refusing to violate a specific statute. Sheets v. Teddy's Frozen Foods, 179 Conn. 471, 427 A.2d 385 (1980)(insisted that employer comply with State Food, Drug, and Cosmetic Act); Trombetta v. Detroit,

Toledo & Ironton R.R. Co., 81 Mich. App. 489, 265 N.W.2d 385 (1978)
(employee discharged for refusing to alter pollution control reports in violation of state law);

Another category of cases finding discharges actionable on public policy grounds is an employee who is terminated for performing an act in the public's best interest. For instance an employee who is discharged for requesting not to be excused from jury duty. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). A more interesting and common case is the employee who is discharged for blowing the whistle on the employer. Better known as the "whistleblower." See Malin, Protecting the Whistleblower From Retaliatory Discharge, 16 Mich. J.L. Ref. 277 (1983).

The whistleblower has been discharged from employment under a variety of circumstances. The West Virginia Supreme Court found actionable a bank's discharge of a consumer credit department manager for calling his superior's attention to certain loan practices violative of the state Consumer Credit and Protection Act. Harless v. First Nat'l Bank, 246 S.E. 2d 270 (W.Va. 1978) In Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) the court recognized an action for wrongful discharge when the employer terminated an employee for his efforts to correct false or misleading food labeling which violated the state Uniform Food, Drug, and Cosmetics Act.

Finally, another category of discharges actionable under the public policy theory consists of discharges based on an employee's exercise of certain legal rights and privileges. The most common example is the discharge of an employee for pursuing a claim under the workers' compensation laws. See Murphy v. Topeka-Shawnee County Dept. of Labor Services, 6 Kan. App.2d 488, 630 P.2d 186 (1981). Courts have found such dismissals

actionable based on the rationale that it would vitiate the public policy expressed in the workers' compensation statutes if workers could pursue their right to compensation only at the risk of losing their jobs. Other examples include cases in which employees were terminated for joining a labor union, Krystad v. Lav, 65 Wash.2d 827, 400 P.2d 72 (1965); asserting rights to leave time, Jones v. Keogh, 137 Vt 562, 409 A.2d 581 (1979); and in designating an attorney for the purposes of negotiating the terms and conditions of employment. Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970).

B. Good Faith and Fair Dealings Exception

Some courts have found an "implied covenant of good faith and fair dealing" in employment contracts which restricts an employer's ability to discharge at-will employees. However, courts have generally rejected the invitation to imply such a duty in employment contracts, voicing the concern that to do so would place undue restrictions on management and would infringe the employer's "legitimate excuse of management discretion." Puch v. See's Candies, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 928 (1981).

Courts willing to recognize an implied covenant of good faith have placed limits on the applicability of the doctrine. The case most often cited for this doctrine is Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). In Cleary, the plaintiff was discharged after eighteen years of employment with the defendant. He alleged that the discharge violated both an express policy of the company regarding employee grievances and the implied covenant of good faith and fair dealing. The court agreed:

[T]ermination of employment without legal cause after such a period of time offends the implied-

in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer. . .to do nothing which would deprive the plaintiff, the employee, of the benefits of the employment bargain - benefits described in the complaint as having accrued during plaintiff's 18 years of employment.

Id. at 455, 168 Cal. Rptr. at 729.

Thus, the court held that the employer could not terminate an employee without good cause, based on both the longevity of the employee's service and the express policy of the employer.

In a number of states, courts have flatly refused to imply covenants of good faith and fair dealing in employment-at-will contracts. Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (1980); Scholtes v. Signal Delivery Service, Inc., 548 F. Supp. 487 (W.D. Ark 1980). It can be said that such an exception would rewrite employment contracts so that employees could be fired only for cause, and would amount to an effective substitute for union collective bargaining agreements and inherent tenure rights.

C. Personnel Policy Manual Exception

When beginning employment, employees commonly receive from their employers or are made cognizant of personnel policy manuals. The employer also provides the employee other documents delineating the employment relationship. These documents typically inform the employee about grievance and termination procedures, severance pay, insurance, vacation pay, and general operating rules. Furthermore, the employer invariably makes oral statements concerning different aspects of the job and assurances pertaining to the position. A number of states have held that an employer's oral representations regarding such things as job security and employee disciplinary procedures and other representations contained in employee manuals constitute binding contracts, supplementing the at-will

agreement, and thus limiting the employer's absolute right to discharge an at-will employee. See Conley v. Board of Trustees of Grenada County Hospital, 707 F.2d 175, 180, reh. den. 716 F.2d 901 (5th Cir. 1983)(Employment-at-will doctrine abrogated where county hospital personnel manual assured employees that "[f]or those who measure up to the special demands of hospital employment, there need be no fear of lay-off.") Hammond v. North Dakota State Personnel Board, 345 N.W.2d 359 (N.D. 1984)(State Personnel Policies Manual constituted binding contract, requiring State Personnel Board to make findings whether dismissal was based on just cause as defined in personnel manual.)

In DeFrank v. County of Greene, 50 Pa. Commw. 30, 412 A.2d 663 (1980), Greene County asserted that its personnel manual did not operate to establish employee rights with regard to dismissals from employment because the manual, promulgated by a past administrator, had not been adopted or ratified by any formal action of the county commissioners. Therefore, the claimant was an at-will employee and could be terminated by the county. The court succinctly stated that:

"[W]e believe that an employee's expectation of the operative validity of a document is fully reasonable when that document is held out by her superiors, to both the employee and the state, as an embodiment of the personnel policy of the employer. To allow a political entity to represent to its employees, through its chief administrators, their 'right to a hearing' and an assurance of 'job security', and then to permit that entity to disavow those words of entitlement when an employee takes those words at face value, would violate any conception of fundamental fairness." Id. at 666-67

The leading case in this area is Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) in which the Supreme Court of Michigan upheld a jury verdict for a plaintiff, an employee-at-will, who

claimed he had been discharged without just cause in violation of his employer's personnel manual. When hired, the employee inquired about job security, and representations were made that the job would exist as long as each employee "did his job." The employee was given a written policy manual which reinforced the oral assurances of job security. The manual stated that "it is company policy to release employees for just cause only." The court concluded that when a prospective employee inquires about job security and is given assurances, a fair construction is that the employee may be discharged for good cause only.

It must be noted that employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason. Mav v. Omaha National Bank, 207 Neb. 308, 299 N.W.2d 147 (1980). "However, if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it." Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984).

Other courts, for a variety of reasons, have denied contractual causes of action to at-will employees allegedly discharged in violation of oral assurances and personnel manuals. For example, an offer of a "steady job" and a promise of a raise in three months were not enough to overcome the presumption that the employment for an indefinite term was terminable at will. Watson v. Zep Mfg., 582 S.W.2d 178 (Tex. Civ. App. 1979). Some courts have reasoned that there was no mutuality of obligation or consideration to support the claimed contractual rights in the absence of an actual binding promise by the employee to continue in employment. Shaw v.

S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975).

It must be noted that school districts should not totally rely on these cases when determining its personnel policies. It is imperative that Kansas school districts plan ahead in order to defuse the implied contract "timebomb," in order that it does not explode in their faces.

III. STATUS OF THE LAW IN KANSAS

The employment-at-will doctrine was traditionally setforth in Swart v. Huston, 154 Kan 182, 117 P.2d 576 (1941). The Kansas Supreme Court in Swart reasoned that in the absence of a contract express or implied between an employee and employer covering the duration of such employment, no action for discharging the employee from service can be maintained against the employer. Id. at 182. The court held that the "contract failed to include any mutual or reciprocal obligation between the parties and was therefore unenforceable." Id. at 186. Hence, the employee was privileged to quit whenever he chose, and conversely, the employer could therefore discharge the employee at any time without being subject to wrongful discharge.

Kansas has joined the majority of states in embracing a public policy exception to the employment-at-will doctrine. In Murphy v. City of Topeka, 6 Kan. App. 2d 488, 630 P.2d 186 (1981), the plaintiff was employed by the Department of Labor Services of the City of Topeka. After the plaintiff sustained certain injuries while on the job he filed a worker's compensation claim as authorized by statute. The City offered the plaintiff further employment if he agreed to abandon his worker's compensation claim. When he refused, his employment was terminated. The court departed from the long-standing employment-at-will doctrine by upholding the plaintiffs wrongful discharge claim. The Kansas Court of Appeals stressed the underlying public policy of compensating injured workers, by holding that the statutory purpose

would be undermined if retaliatory discharges were allowed to go unchallenged. This case is important because it signifies the courts willingness to depart from the strict application of the traditional rule and move towards recognizing causes of action for wrongful discharge.

The Kansas Supreme Court in Johnson v. National Beef Packing Co., 220 Kan 52, 551 P.2d 779 (1976) adhered to the traditional doctrine of at will employment by not allowing any recovery based on contract or implied covenant of good faith and fair dealing. In Johnson the plaintiff at the time of his initial employment was told by his employer that he would be a probationary employee for ninety days and if during that period he could prove that he could lug beef he would be a "permanent employee." The duration of employment was not agreed upon and no written contract was executed. Plaintiff injured his shoulder on the job and therefore, could no longer lug beef. He was transferred to various positions but was subsequently fired.

Plaintiff alleged that the employers action constituted a wrongful discharge because of employers oral representations and statements in the "Company Personnel Manual" provided to plaintiff following his initial hiring, which stated "No employee shall be dismissed without just cause." The court rejected this argument by stating the terms of the manual "were not bargained for by the parties and any benefits conferred by it were mere gratuities."

Id. at 54 On these facts the court therefore held that:

in the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party, and the employee states no cause of action for breach of contract by alleging that he has been discharged.

Id. at 54

Johnson can easily be limited to its facts. It must be noted that the Personnel Manual was not published until long after plaintiff's employment.

Also, the court seems to leave the door ajar by stating:

[W]here no definite term of employment is expressed, the duration of employment depends on the intention of the parties as determined by circumstances in each particular case. The understanding and intent of the parties is to be ascertained from their written or oral negotiations, the usages of business, the situation and object of the parties, the nature of the employment, and all the circumstances surrounding the transaction.

(Emphasis Added) Id. at 54-55

In Allegri v. Providence-St. Margaret Health Center, 9 Kan. App. 2d 659, 684 P.2d 1031 (1984) the Kansas Court of Appeals reversed the District Courts holding for the employer on a motion for summary judgement. The claim arose out of the termination of plaintiff by the employer-Health Center.

Plaintiff contended that his termination breached an implied contract of employment with the defendant Health Center which provided that he could continue to work as long as his job performance was satisfactory and he abided by the hospital rules. The implied contract, plaintiff contended, was based, inter alia, on a hospital administrator's statement to plaintiff that he could work until age sixty-five if he abided by hospital rules, and the Health Center's Employee Handbook, which led plaintiff to believe he could be terminated only "for cause."

The court in disapproving the lower courts entry of summary judgement reasoned that determining whether an implied contract of employment exists requires a factual inquiry. Intent of the parties may be shown by acts, circumstances and inferences, which is normally a question of fact for the jury. The court stated "that parties may become contractually obligated by their nonverbal conduct as well as by their use of oral or written words. . . . A Review of the record indicates sufficient testimony to raise a material question whether the conduct of the parties evidenced an implied employment agreement."

Once again it can be implied that the court is amenable to the carving away of the employment-at-will doctrine. The Appellate Court in Allegrì could have easily supported the District Court by strictly construing the at-will doctrine, but it chose not to.

The United States District Court for the District of Kansas also had an opportunity to interpret Kansas law pertaining to the "at-will" doctrine. In Fletcher v. Wesley Medical Center, 585 F. Supp. 1260 (D. Kan. 1984) the defendant Medical Center discharged one of its employees. Subsequently, plaintiff initiated a claim based on, inter alia, the argument that Kansas should recognize a covenant of "good faith and fair dealing" implied at law as a part of every employment contract. In addition plaintiff alleged her termination was in violation of the Wesley Medical Center Employee Handbook which constituted an implied contract. The handbook limited reasons employees could be fired, guaranteed them elaborate grievance procedures to contest any proposed termination, and promised two weeks notice of terminations.

The court in responding to plaintiffs argument that Kansas should recognize a covenant of "good faith and fair dealing" agreed with the proposition that the at-will doctrine yielded harsh results, but thought this issue should be left in the hands of the Legislature. However, when addressing the employee handbook issue the court applied the nation wide trend and continued to weaken the rusty armour of the employment-at-will doctrine. The employer argued that Johnson v. National Beef Packing Co., see supra, "stands for the proposition that statements in an employee handbook cannot, as a matter of law, be legally binding upon an employer." 585 F. Supp. at 1263. The court however, stated "that defendants [employers] read the Johnson case far too broadly" 585 F. Supp. at 1263. The court went on to state that employee handbooks could be "one of the relevant circumstances from which the parties' intent

could be inferred." 585 F. Supp at 1264. In fact the District Court went as far as stating that Johnson was entirely consistent with Toussaint v. Blue Cross and Blue Shield of Michigan, see supra, where implied-in-fact contractual limitations on an employer's freedom to fire have been recognized. The court was "confident that the Kansas Supreme Court would adhere to the careful reasoning of [Toussaint]" 585 F. Supp. at 1264. Therefore the court held that defendant's motion for summary judgement be denied as to the implied contract claim.

Just ten months after Fletcher the United States District Court for the District of Kansas had another opportunity to hear a suit against an employer for breach of implied employment contract. In Rouse v. Peoples Natural Gas Co., 605 F. Supp. 230 (D. Kan. 1984) an employee-Rouse brought an action against the employer for breach of implied contract. Rouse contended that a contract implied in fact arose from certain terms of the employment manual which set forth discipline and termination procedures and from prior conduct of the employer, including promotion, positive performance evaluations, and salary increases.

The District Court in Rouse recognized it had taken to large of a leap in Fletcher when the court stated that the Kansas Supreme Court would accept the reasoning of Toussaint. The Rouse Court in essence overruled its decision in Fletcher by stating it was "now convinced that Toussaint is not the law of Kansas." The court drastically cut back on its ruling in Fletcher by holding:

express statements in an employment manual cannot alone create contractual rights in the employee; an employment manual alone, if it is merely a unilateral expression of company policy, if it is not bargained for between the employer and the employee, and if it is not a reflection of mutual assent between the parties, cannot alone be the basis of an implied contract. Nonetheless, an employment manual may be one of the relevant

circumstances from which an implied contract can be inferred.

605 F. Supp. at 232

Even though the United States District Court has vacillated on the at-will doctrine it seems that for the time being the Kansas rule remains that an employment manual, that is only a unilateral expression of the employers policy, cannot alone rise to an employment contract.

IV. PREVENTIVE MEASURES

For school districts to minimize their risks of wrongful discharge liability, they must develop a preventive personnel program. The continuation of past archaic policies is not recommended because, among other things, it is likely to prove highly dangerous. To stand fast, continue past policies, and to slug it out in court is not good for the district nor for an effective employee relations program. The public's attitude, increasingly reflected by legislatures and courts, is clearly growing more supportive of measures providing greater termination protection to employees. In all probability, an essentially litigation-orientated strategy will prove to be too little, too late, and too costly. Remember, the key is to protect yourself from possible litigation and labor strife. Even though the case law is in your favor today, the law may be changing as you read this article. It must be noted that school districts should not take a hard-line approach when implementing these policies. Such an approach may jeopardize your ability to attract wanted personnel and keeping a union-free environment. The following are some suggestions which might alleviate possible litigation in the future.

(1) Review all school handbooks, manuals and other documents.

Since implied contracts have been inferred from such sources as job advertisements, personnel policies, and other written documents, all such statements should be scrutinized, and no assurances regarding job security

should be given or permitted to remain in effect unless the employer fully intends to be bound by them. The documents to be surveyed and carefully examined (preferably by legal counsel) should include but not be limited to the following: promotional literature, job advertisements, employment application forms, hiring correspondence, "welcome aboard" letters, employee handbooks, personnel manuals, guidelines, policy and procedure statements, performance evaluation materials, wage and salary policies, benefit and incentive compensation plan descriptions, and discipline and discharge notices.

These documents should be carefully examined for any language that could imply a contractual relationship where none is intended or any language which might assure certain job security rights beyond managements satisfaction. School documents, for example, should be revised by changing "permanent-employment" to "full-time employment" and "discharge for good or just cause" to "discharge at management's discretion" or "in the judgement of management" or "discharge for failure to maintain satisfactory interpersonal relationships with coworkers and supervisors" or "discharge for failure to meet expected performance levels." Other words which should be revised and are found quite frequently in personnel documents are such words as: "fair", "consistent", "permanent", "long-term", "career", "future", "longevity", "tenure", "security", and "probationary."

Furthermore, a formalized probationary period also sends a message to the employee that once he has fulfilled his probationary period he/she is a permanent-employee who has attained a form of job security. It is recommended that this formal probationary period be abolished. This does not mean that management cannot frequently evaluate the employee during

the initial employment relationship but does say to the employee that at no time will added job security be attached to the position.

(2) Disclaimers

The extent to which disclaimers will be effective to prevent a wrongful discharge suit is not clear, however it is still advisable that such provisions be utilized. Disclaimers should be used in addition to, and not in lieu of, revising documents of language of implicit job security promises.

Schools may want to use such statements as "this is not a contract", "employment is at-will" or "these policies may be changed, modified or revoked at any time by management." A disclaimer should be written very carefully because a disclaimer that is written in harsh legalese may alienate your employees and jeopardize your employment relationship. Employees are less likely to react negatively if the statement shows that the school is making an earnest effort to communicate with the workers, rather than trying to deceive them. The following is a general disclaimer which was held sufficient to bar a wrongful discharge suit: "this [document] is not to be construed as a guarantee of employment for any specified time or any specific type of work. All assignments and continued employment will depend upon your satisfactory performance and the district's determination of the need for your services." See Rushling v. R.C.A. Service Co., 403 So.2d 506 (Fla. App. 1981).

If a district uses an employee handbook or manual a disclaimer such as the following may be used, "this employee handbook is not intended to create any contractual rights in favor of you or the district. The district reserves the right to change, modify or revoke the terms of this handbook at any time." Also if the district does distribute some type of

employee manual to its employees a form may be used to summarize the prominent features of employment rules and benefits while serving as an acknowledgement of receipt of the manual by the employee. This acknowledgement may later prove useful if the employee should contest disciplinary or benefit decisions that are based on rules published in the handbook.

(3) Oral Promises

District recruiters and interviewers should be specifically instructed to take care that any comments about discharge, job security, or promotions reflect established school district policy. Those involved in interviewing should be carefully instructed not to oversell the district. Statements such as "your only limit is your ability", "you will have job security as long as you perform well" or "after the first four months you become a permanent employee" should be avoided. These statements may breed litigation in the future. To avoid these possible problems all job offers should be in writing and contain at-will language or other language which will protect the district from possible litigation.

(4) Performance Appraisals

Regular appraisals of employee performance are highly recommended to districts wishing to avoid unjust dismissal charges. Periodic and competent evaluations reduce the risk that a terminated employee can claim unfair treatment because the appraisal process alerts employees to what is expected of them, where they are deficient, and how they can improve. Appraisals also constitute objective, documented proof of unsatisfactory performance, and will help to establish just cause for a dismissal.

Supervisors/Principals should be honest with their evaluations. Many supervisors become uncomfortable if they have to record unsatisfactory

performance even when a poor evaluation is justified. These type of supervisors will give only "good" or "fair" ratings to employees who simply are not adequately doing the job. This may cause insurmountable problems for the employer who is later faced with a wrongful discharge suit. Even though an employee is terminated for incompetence or misfeasance, the employer is in grave danger if periodic performance ratings have not reflected the workers' true performance. Therefore, supervisors must be carefully instructed on the importance of evaluations. One way to assure proper evaluations is to tie the supervisors own progress rating to his ability to evaluate his employees.

(5) Work Rules

Although it may seem that districts should not publish such documents as employee handbooks and manuals, this is definitely not the approach employers should take. Personnel policies are imperative to an effective employee relation program. However, personnel documents should be sanitized of language which might imply a contractual relationship. Work rules that are properly drafted, communicated and enforced can help the employer justify a dismissal by establishing an objective, good faith reason for termination. These work rules must be enforced evenly across the board if the district wishes to prevent claims of unfair treatment. Unfair treatment claims will be forthcoming when rules are generally ignored or selectively enforced by supervisory personnel.

V. CONCLUSION

The employment-at-will issue is becoming the labor issue of the 80s. With the pendulum swinging in the employees direction, workers will not hesitate to file suit for wrongful discharge actions. Furthermore, wrongful discharge suits are tantalizing for the plaintiff's lawyer, whether because they con-

ceive themselves as operating on the cutting edge of the law or because these suits represent a new source of business, with sizeable contingent fees or both.

Districts and other employers who have not sanitized documents and dialogue of implicit job security promises may find themselves in needless litigation. It is only common sense that employers protect themselves before lightning strikes. School districts should not rely on the Kansas Courts to protect them because as discussed above the trend is toward the abrogation of the employment-at-will doctrine. With Kansas being in the minority it is conceivable that the Kansas Supreme Court if given the appropriate set of facts will join the ranks of the majority. Only time will tell.

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TACTICS IN DEALING WITH EEOC

By Ronald J. James
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I. INTRODUCTION

- A. General advice for clients on how to handle an EEOC charge complaint -- The best place to start is preventive maintenance. All persons making decisions affecting employment should understand the law, the School Board's policy and their own responsibilities.
- B. Despite the most conscientious efforts, however, EEO charges do arise. Consider the following procedures when first faced with a discrimination charge:
 - (1) INVESTIGATE THE CHARGE THOROUGHLY -- Best time to find out what the facts are is immediately after the events in question arise;
 - (2) REVIEW PERSONNEL FILES of the person complaining and all those directly involved in the complaint from the school board's standpoint;
 - (3) EVALUATE YOUR PAST PRACTICES in that particular job classification and department. Have you had trouble before?;
 - (4) HAVE CLIENT WRITE A SUMMARY FOR LEGAL COUNSEL -- Make sure you do this formally so that these communications will be covered by attorney-client privilege;
 - (5) SETTLE if there has been discrimination. It is better to rectify the situation early before extensive backpay has mounted;

- (6) ANALYZE ADVERSE ACTION -- Whether it is innocent or not, adverse action against a reinstated employee may be interpreted as retaliation, which is strongly admonished under Title VII. All disciplinary actions against these employees should at least be reviewed by top personnel and probably legal counsel as well.

II. IMPORTANCE OF INITIAL INVESTIGATION OF EEOC CHARGE
BY THE RESPONDENT

- A. Notice of charge required to be served on respondent within ten days §706(b). Actual investigation by EEOC in some offices may not occur for one year.
 - (1) Therefore early and complete investigation by respondent is essential.
 - (a) To obtain evidence while it is fresh, e.g., memories may fade, key witnesses may terminate or transfer;
 - (b) To keep evidence from being lost (destroyed);
 - (c) To ascertain promptly whether actual or inadvertent discrimination has occurred; and
 - (d) To make corrections and explain facts of life to supervisor (if appropriate).
 - (2) Early investigation will also be helpful in determining whether you want to accept EEOC "no fault" resolution, file position statement or settle early. Obligation if shown a violation is to fix it and the sooner, the better, is usually more economical -- cheapest way out -- an employer with a serious problem may even consider a consent decree or conciliation agreement as it provides a vehicle for solving EEO problem -- one that is reasonably fair (well negotiated).

B. To be of maximum value, the respondent's internal investigation must be:

- (1) Objective and impartial;
- (2) Critical, especially as to latent and subjective prejudices -- need to level with client -- economic disservice if attorney says what client wants to hear;
- (3) Thorough and to the point of being exhaustive e.g., interview all those involved in the charge, obtain any relevant documents;
- (4) (Almost) every case investigation should include the collection and evaluation of comparative data.

E. Prepare for the Investigator's Visit!

III. REPLY TO THE CHARGE

- A. EEOC Procedural Rules provide the respondent (the school) the opportunity to reply to the charge. This statement should be in the form of a "Statement of Position". See 29 C.F.R. §1601.14.
- B. This "Statement of Position" allows the company to state its version of the facts and direct the investigator's attention during the course of the eventual investigation. The Company's aim is to have the Commission eventually reach a finding of no reasonable cause.
- C. Preparation of the "Statement of Position" should proceed from the internal report previously prepared.
- D. "Statement of Position" is Important:
 - (1) Use prior to request for information by EEOC e.g. as soon as notified of charge;

- (2) Use to respond to EEOC boiler plate interrogatories - in addition to or in lieu of;
- (3) Important to have a version of client's side in EEOC file especially when charge is reviewed by a supervisor during conciliation stage or by an EEOC attorney during Agency decisional process in deciding whether to sue.

IV. THE ADMINISTRATIVE STATE OF INVESTIGATION OF THE CHARGE BY EEOC

- A. A threshold question is whether one should participate in the administrative process at all. The disadvantage, of course, is the presumption of guilt. The advantages are many, e.g., favorable paper record of your side, and counsel still, despite limitations placed on counsel, can provide a valuable role.
- B. Advice to company personnel of action to take when the EEOC investigator makes contact:
 - (1) Immediate notification of counsel and other responsible school personnel, forwarding any subpoena or request for documents, etc.;
 - (2) Do not permit any interviews, examination of documents, or inspection of premises prior to consultation with counsel;
 - (3) Dealing with the Investigator:
 - (a) Make visit as pleasant as possible;
 - (b) Avoid outside interferences (phone calls);
 - (c) Avoid impression school district does not have the time or that the investigation interferes with business;
 - (d) Try to keep investigator focused on the charge basis/issue.

C. Initial negotiations with EEOC investigator:

- (1) Determine what documents and what interviews are sought;
- (2) Determine what records the company has -- identify any potential problems in compliance and possible alternative sources and/or formats for the requested information;
- (3) Insure non-destruction of subpoenaed documents;
- (4) Negotiate with investigator as to scope of request -- work out problems of interpretation, time period covered, use of affidavit in lieu of witnesses, time for compliance;
- (5) Confirm all agreements and understandings in writing; and
- (6) Should always establish yourself as a representative of the client contact (the whipping person) even requiring client in meetings to get in the habit of handing all documents to you so you can turn them over to the investigator and also give you the opportunity to review and to make sure these are documents you previously have reviewed with client.

D. Interviews with company employees:

- (1) Below supervisory level:
 - (a) Do not permit interviews during working hours or on company property?
Advantages/disadvantages;
 - (b) No attempt to prevent -- or follow up on -- EEOC interviews with nonsupervisors;
 - (1) EEOC has no right to interview;
 - (2) EEOC has right to employee's addresses.

(2) Supervisors-Administrators and above:

- (a) No discussions with EEOC investigator except when counsel is present as employer has right to counsel, compliance officer may agree to attorney's presence for convenience of being able to interview;
- (b) Thorough preparation for EEOC interview and counsel's preparation of witnesses "same" as for deposition or arbitration;
- (c) To give or not to give a written statement, generally no;
- (d) Techniques of preparation statements.

E. Production and inspection of documents:

- (1) EEOC has broad powers under §709 -- can inspect any evidence that "relates" to unlawful employment practices and is "relevant" to the charge under investigation.
- (2) General guidelines:
 - (a) Negotiate to narrow scope;
 - (b) Consider alternative to full production -- summaries, seniority lists, etc. (mini-position statement);
 - (c) No production of documents without prior legal clearance -- removing those subject to a claim of privilege or irrelevant to investigation -- should notify investigator what has been removed and reason(s) why;
 - (d) Never allow EEOC investigator to prowl through records at school premises;
 - (e) Always keep exact duplicate copy of all documents furnished to EEOC investigator.

F. Enforcement by EEOC of its demand for document production:

- (1) Section 709 adopts by reference the investigatory powers of §11 of the NLRA, i.e., agency subpoena, five-day period for petition to revoke or modify, subsequent petition by agency to court for enforcing order.
- (2) In case of serious dispute with EEOC over document production, invoke court proceedings:
 - (a) Federal judge normally more likely to appreciate problems of burdensomeness -- and to have less expansive view than EEOC of what is relevant and what is not;
 - (b) If a cooperative relationship with the investigator is established, a decision to withhold a particular document(s) will usually not become the subject of a subpoena demand;
 - (c) Offer alternative to investigator's production demand in letter form to EEOC attorneys handling subpoena enforcement.
- (3) Limitation of document production to a single facility:
 - (a) Highly desirable;
 - (b) Can occasionally be accomplished -- Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973).

G. No formal procedure for appealing cause determination, but nothing to prevent a filing of a petition for rehearing with the Commission, 29 CFR §1601, 19b(d) -- if nothing else, useful document to have in record.

V. CONCILIATION MEETINGS WITH EEOC

- A. EEOC's position is that there is no right to counsel at the conciliation meetings. Counsel should definitely attend, and if possible settle, and if nothing else, to learn and to inform the government's representative.
- B. Conciliation meetings (Webster's definition -- To gain good will or favor by pleasing acts to win over, to make friendly):
 - (1) Submittal of form conciliation agreements by EEOC;
 - (2) Utility of counter-offers and hard bargaining.
- C. Approach:
 - (1) Listen at initial conference and question;
 - (2) Obtain basis for EEOC position (criticize);
 - (3) Written Response:
 - (a) Remove irrelevant provisions;
 - (b) Insert provisions to protect client.

CURRENT ISSUES UNDER THE ADEA

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CURRENT ISSUES UNDER THE ADEA

I. Compensation Systems

A. Equal Employment Opportunity Commission v. Governor Mifflin School District, CA. No. 85-0241, slip opinion (E.D. Pa. October 10, 1985)

1. As of the 1983-84 academic year, teachers were paid on 28 steps. One step had been added per year for a number of years to prevent teachers from reaching the top.
2. During 1983 negotiations, the District and the Education Association agreed on a "compaction plan", the provisions of which:
 - (a) Reduced the number of steps to 24.
 - (b) Gave all teachers an across the board raise (without step increase) of \$1,288.
 - (c) Gave teachers below step 23 a \$400 step increase.
 - (d) Result:
 - (1) Under step 23 - \$1,688 raise
 - (2) Step 23 - \$1,738 raise
 - (3) Steps 24 and 25 - \$1,513 raise
 - (4) Steps 26 and 27 - \$1,401 raise
 - (5) Step 28 - \$1,288 raise
3. After complaint and investigation, the EEOC filed suit alleging that the compaction plan violated the ADEA because it provided lower raises for teachers in steps 24 through 28. The EEOC also challenged raises for earlier years in which all teachers received an across the board pay increase along with a percentage (\$1,000 plus 5%), on the ground that older teachers received a lesser effective raise under this system. The challenge to earlier years was dismissed based on the statute of limitations. However, throughout the proceedings the EEOC argued that the only lawful method of distributing salaries to teachers working under a step salary system was a simple across the board percentage increase.
4. On the issue of the legality of the 1983-84 compaction plan, the EEOC argued that it was

unlawful because it had a disparate impact on older workers. The defense strenuously asserted that the Title VII concept of disparate impact (Griggs v. Duke Power Co., 401 U.S. 424 (1971)) should not be extended to ADEA cases.

5. The court rejected this defense on the ground that Title VII and the ADEA are virtually identical statutes. Lorillard v. Pons, 434 U.S. 575 (1977).
6. Defendants next argued that the disparate impact analysis does not fit in the context of a compensation case, and should be limited to cases involving clearly delineated employment practices. In support of that theory, the defense cited AFSCME v. State of Washington, 770 F. 2d 1401, 38 FEP Cases 1353 (9th Cir. 1985), which held that a compensation system which is responsive to supply and demand and other market forces is not such a clearly delineated employment policy.
7. The court also rejected that defense on the ground that this action was not a broad based challenge to a compensation system, but an attack on a specific, discrete event - the setting of one year's salary. However, the court concluded it need not decide whether the disparate impact analysis was appropriate in a compensation case because:
 - (a) Plaintiff failed to demonstrate a prima facie case; and
 - (b) Defendants have valid, nondiscriminatory reasons for their actions.
8. The court's analysis:
 - (a) Prima facie case
 - (1) A showing that a facially neutral employment practice had a significant discriminatory impact. Connecticut v. Teal, 102 S. Ct. 2525, 2531 (1982).
 - (2) If such a showing is made, employer must demonstrate that the requirement

has a "manifest relationship to the employment in question".

- (3) Plaintiff may then attempt to show the practice was a pretext.

(b) Plaintiff's action rejected because:

- (1) Disparate impact analysis of EEOC relied on too narrow a portion of the employer's compensation system - the amount of a yearly pay increase. The compensation system is not discriminatory if this issue is not examined in isolation. Rather, older, more experienced teachers are more highly paid.
- (2) Defendants' had legitimate reasons for negotiating the compression plan in this case:
 - a. The plan would move teachers to the top of the salary system more quickly;
 - b. The plan would limit the disparity between the lowest and the highest paid employees;
 - c. The parties had a desire to avoid perpetuating new steps every year and to enhance the professional status of those who would reach the top of the scale.

9. The case has not been appealed.

10. Some thoughts on the current EEOC position

- (a) The EEOC is unlikely to again argue that only across the board percentage raises are acceptable under the ADEA.
- (b) The EEOC is likely to accept across the board dollar raises.
- (c) The EEOC will continue to scrutinize carefully any compensation plan in which

employees at higher steps of the salary scale receive dollar amounts which are lower than those received by employees at the bottom end of the salary step system. This is particularly true if such a system is continued for a number of years.

- (d) Where there are special compressions, adjustments, or incentives placed in the lower ends of the salary scale (such as those designed to raise starting salaries), employers would be well advised to articulate the legitimate reasons for such extraordinary compensation situations and be prepared to respond to a government challenge.

II. Obtaining Releases which Waive ADEA Rights

- A. The growing trend among labor and employment lawyers to offer inducements for a resignation and release upon termination of employment.
- B. Is a private release effective to waive rights under the ADEA?
 - 1. Runyan v. National Cash Register Corp., 37 FEP Cases 1086 (6th Cir. 1985), Vacated, 38 FEP Cases (6th Cir. 1985); Runyan v. National Cash Register Corp., 40 FEP Cases 807 (6th Cir. 1986). In Runyan, a divided panel of the 6th Circuit first held that ADEA rights cannot be waived by a private unsupervised release, citing as support cases arising under the enforcement provisions of the Fair Labor Standards Act. Brooklyn Savings Bank v. O'Neil, 324 U.S. 627 (1945); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). On April 7, 1986 the court, having reheard the case, en banc, held that a private release of rights under the ADEA was not void as a matter of law. The holding in this case must be viewed in the context of its circumstances. The employee signing the release was an attorney who practiced in the field of labor and employment law, and the Court stressed the voluntary, knowing character of the waiver.
 - 2. Proposed EEOC rules: 50 F.R. 40870 - On October 7, 1985 the EEOC proposed an amendment to 29 CFR

part 1627, entitled "administrative exemption allowing for waivers under the ADEA". Citing the first Runyan decision of the 6th Circuit with disapproval, the EEOC would permit waivers which are knowing and voluntary if they clearly provide actual notice of the nature of the rights that are waived and are freely negotiated without fraud or duress.

3. Must the release specifically mention rights under the ADEA?
 - (a) Runyan says "no"
 - (b) Proposed EEOC rules do not seem to require specific mention of the statute.
 - (c) Failure to reference the statute may nevertheless enhance the employee's chances of successfully challenging the waiver.

III. Some Thoughts About Early Retirement Incentives

- A. The most compelling authority is that early retirement incentive plans which are part of a bona fide employee benefit plan are permissible, even if they offer greater incentives to some persons within the protected age group than to others. Patterson v. Independence School District #709, 35 FEP cases 1236 (8th Cir. 1984).
- B. Whether Patterson represents a view accepted by the EEOC is a mystery.
 1. 29 CFR §1625.2 states that an employer may not give preference based on age as between individuals within the 40 - 70 age bracket, and further:

"The extension of additional benefits, such as increased severance pay, to older employees within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act."

C. EEOC opinion letter, 12/15/83 (246 DLR D-2)
(12/21/83):

"An employee who retired pursuant to an early retirement incentive or special benefit may not be denied consideration for rehire merely because he has retired as long as he is within the age group protected by the ADEA."

ENTL. . .

10-10-85

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

v.

GOVERNOR MIFFLIN SCHOOL
DISTRICT and GOVERNOR MIFFLIN
EDUCATION ASSOCIATION

CIVIL ACTION

FILED OCT 10 1985

NO. 85-0241

MEMORANDUM AND ORDER

HUYETT, J.

OCTOBER 9, 1985

Presently before me is plaintiff's motion for partial summary judgment and defendants' motions for summary judgment. For the reasons set forth below, defendants' motions will be granted and plaintiff's motion will be denied.¹

Background

Plaintiff Equal Employment Opportunity Commission ("EEOC") is challenging the salary system and pay raises negotiated between the Governor Mifflin School District ("GMSD") and Governor Mifflin Education Association ("GMEA") over the

¹ Plaintiff and defendant Governor Mifflin Education Association have moved for leave to file supplemental briefs. These motions are both granted. These briefs have already been filed and I have relied on them in reaching this decision.

years 1981 through 1984. The facts appear to be largely undisputed although they are somewhat complicated.

Before 1974, the GMSD had a fifteen-step salary system. Under that system, teachers entered at step one and progressed year-by-year to step fifteen. Once they attained step fifteen, that is after they had amassed fifteen years seniority, there was no further step-by-step advancement. Each step increase equated with an increase in salary. In addition, all teachers in the system received a yearly salary increase. Thus, a teacher moving from step five to step six received an increase equivalent to the difference between the new step six salary and the old step five salary. Teachers at the highest step did not get a step increase. They did, however, receive a salary increase each year.

Beginning in 1974, this system changed. From that point until the 1983-1984 academic year, additional steps were added to the top end of the salary ladder each year. As a result, the number of steps increased from fifteen to twenty-eight. No teacher during this period ever reached the top step of the system because the top step slipped upward each year. Between 1974 and 1981, each teacher received a yearly salary increase of a set dollar amount. This amount was identical for all teachers in the district.

Beginning in 1981, a new method of distributing salary increases was instituted. From that year until the 1983-1984

academic year, each teacher received a raise equal to a set dollar amount plus a percentage of his or her yearly salary. Thus, all teachers would, for example, receive \$1,000 plus five percent of their salary as a yearly increase. The result of this was that the highest paid teachers (those with the most seniority at the high end of the salary system) received the largest raises. Thus, the disparity between the highest paid teachers and the lowest paid teachers grew each year.

In 1983, the GMEA proposed a new system. Under this proposal, the number of steps were to be cut and the number of steps fixed. A teacher would advance step-by-step until he or she reached the top step. Each year until then, the teacher would receive a set "step increase." In addition, there would be an overall raise given to all teachers. This proposal was adopted by the GMSD.

The new system had a number of practical effects. Of primary importance to this suit is that the existing step system was compacted. In 1983, there were twenty-eight steps. Under the "compaction plan" the number of steps was reduced to twenty-four. All teachers received a raise of \$1,288. With this raise, the salary for those teachers at step twenty-eight became \$27,360. This salary became the top salary for the district and all those who were to be at step twenty-four or above had their salaries adjusted upward to this amount. In addition, all those teachers below step twenty-three received \$1,288 plus a \$400 step

increase. As a result of this compaction, teachers below step twenty-three received a raise of \$1,688; those at step twenty-three received \$1,738; those at steps twenty-four and twenty-five received \$1,513; those at steps twenty-six and twenty-seven received \$1,401 and those at step twenty-eight received the flat \$1,288.

The EEOC claims that the salary increase for the years 1981-1982 and 1982-1983 discriminated against older teachers in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. In addition, the EEOC claims that the salary adjustments made pursuant to the compaction plan also violated the ADEA. The basis for these claims is that older employees in 1981 and 1982 received less of an effective salary increase than did younger employees because the increases in those years included a fixed amount in addition to the percentage increase. In 1983-1984, the EEOC argues, employees at steps twenty-four through step twenty-eight received a lower increase than did younger teachers. The EEOC admitted at oral argument that the only method of distributing pay increases that comported with its interpretation of the ADEA would be a simple percentage increase made across-the-board.

Presently before me is the EEOC's motion for partial summary judgment on liability and defendants' motions for summary judgment. The parties have raised a number of difficult legal issues some of which involve unsettled areas of the law.

Discussion

Summary judgment may be granted when it has been established that there are no issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Small v. Seldows Stationary, 617 F.2d 992 (3d Cir. 1980). The court does not decide issues of fact, but merely determines if there is an issue of fact to be tried. Ettinger v. Johnson, 556 F.2d 692 (3d Cir. 1977). The facts must be viewed in the light most favorable to the non-moving party and any reasonable doubt regarding the existence of a genuine issue of material fact is to be resolved against the moving party. Continental Ins. Co. v. Bodie, 682 F.2d 436 (3d Cir. 1982). The resolution of the pending motions is made easier by the fact that the parties do not seem to dispute the relevant facts.

Defendants have attacked the EEOC's case in a number of ways. As a threshold matter, they contend that claims concerning the 1981-1982 and 1982-1983 academic years are barred by the statute of limitations. They also claim that the EEOC cannot proceed under a disparate impact theory under the ADEA; that the disparate impact approach cannot be applied in a case involving compensation systems; that there was no disparate impact even if that theory is available to the EEOC, and that there were "reasonable factors other than age" which justified the disparate impact, if any does exist. After a careful review of the memoranda of law submitted by the parties, I have

concluded that the EEOC's claims concerning the 1981-1982 and 1982-1983 ~~academic years~~ are time-barred and that even if a disparate impact theory is available in an ADEA case challenging a compensation system, the EEOC has not made out a prima facie case of discrimination and that the defendants have demonstrated that their decisions were made based on "reasonable factors other than age."

1. The Statute of Limitations

Section 4(a) of the ADEA provides:

(a) It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

29 U.S.C. § 623(a).

The rights created by this section are "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 626(b). The FLSA establishes that an action will normally be barred by the statute of limitations if brought more than two years after the discriminatory event took place. An exception is made for

"willful" violations which may be challenged up to three years after the event took place. See 29 U.S.C. § 255. (The Portal-to-Portal Act established a statute of limitations for actions brought under the FLSA.)

The EEOC filed this action on January 16, 1985. Thus, unless the three-year limit applies, all causes of action which accrued before January 16, 1983 are time-barred. Because the negotiations for, and the adoption of, the collective bargaining agreements for the 1981-1982 and 1982-1983 academic years occurred before that date, unless the three-year statute of limitations applies, the EEOC's claims with regard to those years are time-barred.

"Willful" is not defined in either the FLSA or the ADEA. This "unfortunate" term, see Wehr v. Burroughs Corp., 619 F.2d 276, 281 (3d Cir. 1980), is capable of a myriad of meanings principally because it has a long history as a term of art in the criminal law. In Trans World Airlines v. Thurston, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985), the Supreme Court interpreted the term "willful" in the context of the ADEA for the first time. Unfortunately, Thurston arose from the parallel usage of the term in the liquidated damages context,² and as such does not directly answer the question before me.

² Under the ADEA (incorporating provision of the Portal-to-Portal Act), a defendant who has committed a willful violation may be liable for double damages.

In Thurston, the Supreme Court held that a violation of the ADEA was willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Id. at 4028 (quoting Thurston v. Trans World Airlines, 713 F.2d 940, 956 (2d Cir. 1983)). The Court expressly rejected an interpretation of willful which was more lenient. This rejected definition, which is identical to the one urged by the EEOC, would make a violation willful if the employer "knew the Act was in the picture." See e.g., Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1971); EEOC v. Central Kansas Medical Center, 705 F.2d 1270, 1274 (10th Cir. 1983). The Court reasoned that the liquidated damage provisions of the Act were intended to be punitive in nature and that Congress could not have intended for the ADEA to punish all acts committed if the employer "knew the Act was in the picture." Thurston at 4028. The Court stated: "[W]e are unpersuaded by respondents' argument that a violation of the Act is 'willful' if the employer knows of the potential applicability of the ADEA. Even if the 'in the picture' standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages." Id. (note omitted). The Court specifically noted that the Circuits were split regarding whether the same standard should apply to both liquidated damages and the statute of limitations. See id. at n.21. (citing Kelly v. American

Standard, Inc., 640 F.2d 974 (9th Cir. 1981) (standards for liquidated damages and statute of limitations different); Spagnulo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981) (standards the same)). Since Thurston, at least one court has held that one standard applies to both aspects of willfulness, and has applied the Thurston standard. See Slenkamp v. Burrough of Brentwood, 38 Fair Empl. Prac. Cas. (BNA) 73 (W.D. Pa. 1985).

A review of the Thurston decision and the nature and purpose of the two-tiered system created by the FLSA suggest that there should be two different standards. The Thurston Court stressed that liquidated damages are intended to punish a violator of the act and are therefore quasi-criminal in nature. The policy behind the award of liquidated damages is to deter future violators of the Act. See Dean v. American Security Insurance Co., 559 F.2d 1036, 1039-40 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978). The two-tiered statute of limitations has different functions entirely. See Kelly, 640 F.2d at 979.

Although the Thurston court did question whether there were any grounds for applying two different interpretations of willful, the Court's holding is limited to the standard to be applied to the issue of liquidated damages. Moreover, the Court chose the more stringent standard out of a concern that the punitive provisions of the ADEA not be applied against everyone who could be said to have "known the Act was in the picture" at

the time she or he acted. On the other hand, the extended statute of limitations is not punitive in nature; it merely extends the ability of a plaintiff to bring a suit in a situation in which the discriminating defendant knows that the Act applies to the type of actions she or he has taken. See also Wehr, 619 F.2d at 282-83 (Court stresses that a lower standard should be applied in connection with the term willful in civil as opposed to criminal cases). I therefore conclude that although a plaintiff must show actual knowledge or reckless disregard of the statute in order to recover liquidated damages, she or he must only demonstrate that the defendant knew that the Act was in the picture in order for the three-year statute of limitations to apply.

Even under this more liberal standard, however, the EEOC has failed to meet its burden. The EEOC apparently concedes that there was no actual knowledge on the part of the defendants that the ADEA prohibited the salary scheme in effect. Plaintiff's memorandum in support of its motion for summary judgment at 22 (citing DiCintio deposition at 117-18; Riley Deposition at 36). The EEOC argues, however, that the defendants had constructive knowledge and that this constructive knowledge makes their actions willful. In support of this argument, the EEOC points to the placard requirement of the ADEA which mandates that all employers post a notice of the ADEA in the workplace. This provision applies to all employers covered under the Act.

The flaw in the EEOC's constructive notice argument is that it would effectively remove the two-tiered limitations system incorporated into the ADEA. Because all employers are required to post the notice, all would have constructive knowledge of the ADEA and all would therefore be acting willfully at all times. This argument goes too far. Certainly the mere fact that Congress created two distinct statutes of limitations means that Congress intended that some acts would fall under the two-year statute. The EEOC's position would make all actions subject to the three-year requirement. Although the "in the picture" standard is a lower one than the "reckless disregard" standard adopted in Thurston, it is not so low as to sweep all employer actions into the three-year statute. In the present case, there is unrefuted testimony by those involved in the negotiation of the contract that they were unaware of the ADEA's prohibitions. The EEOC has presented no evidence to refute this lack of actual knowledge of the Act. There is simply no basis other than the "constructive notice" theory of the EEOC or idle speculation for me to conclude that the defendants were aware that the "act was in the picture." I therefore conclude that the claims based on the 1981-1982 and 1982-1983 academic years are time-barred.

2. Disparate Impact under the ADEA

Defendants argue passionately that the disparate impact theory developed under Title VII should not be transferred to the context of the ADEA. Although this is a close question, defendants' arguments fail.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court held that Title VII extends to non-intentional discrimination. Since Griggs, the courts have elaborated the "disparate impact" theory under Title VII. The EEOC apparently concedes that any discrimination that took place in this case was not the product of an intentional decision to discriminate against older teachers. Rather, it argues that the salary decisions made by the defendants affected older teachers disproportionately to younger teachers.

As the Supreme Court has noted, Title VII was the main inspiration for the language of the ADEA, Lorillard v. Pons, 434 U.S. 575 (1977). Thus, it would appear perfectly reasonable to assume that the interpretation of Title VII made in Griggs would be equally applicable to the ADEA. Indeed, the Second Circuit so concluded after a cursory examination of this issue. Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). Geller has been followed by a number of other courts. See, e.g., EEOC v. Bordens, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984); Leftowich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983). The Third Circuit has expressly left this question undecided. Massarky v. General

Motors Corp., 706 F.2d 111, 120, cert. denied, 104 S. Ct. 348 (1983).³

Defendants argue that for several reasons the application of the disparate impact doctrine to ADEA cases is improper. These arguments are based both on the language of the ADEA and its legislative history.

First, defendants point to § 4(f) of the ADEA, 29 U.S.C. § 623(f)(1) which provides:

It shall not be unlawful for an employer, employment agency, or labor organization --

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.

Defendants argue that the inclusion of the "reasonable factors other than age" language in § 623(f)(1) requires the conclusion that the ADEA reaches only to intentional

³ Massarky was decided over the dissent of Judge Sloviter who would have followed Geller. Plaintiff cites EEOC v. City of New Castle, 32 Fair. Empl. Prac. Cas. (BNA) 1409, 1412 (W.D. Pa. 1983) as a case that follows Geller. The New Castle court apparently read Massarky as adopting the position taken in Geller. I believe that New Castle misread Massarky in this regard.

discrimination. This argument is strengthened by County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981) in which the Court interpreted similar language in the Equal Pay Act. Gunther involved the Bennett amendment to Title VII which imports into that act elements of the Equal Pay Act. The Bennett amendment modified Title VII to make all pay discriminations "authorized" under the Equal Pay Act nonactionable under Title VII. One of the elements imported was an affirmative defense allowing employers to base pay systems on "any other factors than sex." In interpreting this language and simultaneously contrasting the operations of Title VII and the Equal Pay Act, the Court observed that, "[the affirmative defense] was designed . . . to confine the application of the [Equal Pay] Act to wage differentials attributable to sex discrimination." Id. at 170. By contrast, Title VII was intended to reach to both overt discrimination and "'practices that are fair in form, but discriminatory in operation.'" Id. (quoting Griggs, 401 U.S. at 431). Because the ADEA contains a provision like that discussed in Gunther, defendants argue that it too should apply only to cases of intentional discrimination.

For several reasons, I consider defendants' arguments based on Gunther to be misplaced. The Court's discussion of this issue was explicitly based on its reading of the legislative history and intent of the Equal Pay Act. For the reasons set forth below, I do not believe that the ADEA's legislative history

provides the kind of unequivocal support for the interpretation urged by defendants that the Court found in the legislative history of the Equal Pay Act. See generally Corning Glass Works v. Brennan, 417 U.S. 188, 198-201 (1974). Moreover, although the Equal Pay Act language and the language found in the ADEA are similar, they are not identical. The Equal Pay Act excludes all pay differentiations based on "any factor other than sex" whereas the ADEA excludes actions based on "reasonable factors other than age." Although this may be a small difference, the language in the ADEA requires that a court evaluate the proffered explanations for an action to determine whether the non-age bases are "reasonable." The Equal Pay Act, on the other hand, involves an absolute defense. Thus, the ADEA's provision is more akin to the allowance of affirmative defenses under Title VII than it is to the Equal Pay Act. Under a disparate impact analysis, of course, once a plaintiff has established a prima facie case, the defendant may then demonstrate an acceptable justification for its actions. The plaintiff may still prevail, however, if the justification is pretextual.

Defendants also argue that the legislative history of the ADEA discloses that Congress intended for it to reach only intentional discrimination. Although this history has been described as surprisingly "lucid," see Blumrosen, Interpreting the ADEA: Intent or Impact, in Age Discrimination in Employment (M.B. Lake ed. 1981), it is far from clear that Congress intended

to limit the application of the ADEA to cases of intentional discrimination. It is true that the legislative history does contain certain suggestions to that effect. It is also true that the origin of the ADEA was substantially different from Title VII. On balance, however, it is clear to me that Congress intended to treat the ADEA and Title VII identically. Although the history and origin of the two are different, the enacted statutes are virtually identical, a fact recognized by the Supreme Court in Lorillard in 1978. In that same year, Congress substantially amended the ADEA and no changes were made to reflect the purported desire to limit the ADEA to cases of intentional discrimination. Of course Griggs had been decided some seven years before. The ADEA was again amended in 1984, after Geller, and although § 4(f)(1) was modified, no change was made to "correct" the erroneous interpretation given to the statute by Geller. See Older American Act Amendments of 1984, § 802(b)(1), Pub. L. 98-459 (1984) (codified at 29 U.S.C. § 623(f)(1)). To accept defendants' argument regarding the intent behind the ADEA would require the conclusion that Congress chose to copy Title VII for no real reason, then chose not to correct improper interpretations of the Act twice.

Although the legislative history of a piece of legislation is an important guide to its interpretation, the starting point must be the statute itself. In this case, the statute is the same as Title VII. In Griggs, the Supreme Court

based its decision that Title VII reached to nonintentional discrimination on the plain language of the statute itself: "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 429-30. Indeed, outside of the Court's discussion of § 703(h) of Title VII (dealing with the use of employment tests) there is not a single reference to the legislative history in the Court's opinion.

The language of Title VII and the ADEA are identical as relevant in this case. If the existence of the disparate impact approach is apparent from the "plain" language of Title VII, it must also be apparent from the plain language of ADEA.

This interpretation of the ADEA is bolstered by another aspect of the Act. As I have already discussed at some length, the ADEA incorporates two different standards for the application of the statute of limitations and for damages. Defendants can be subjected to double damages for willful violations of the Act and plaintiffs may bring suits within a longer period of time if the violation is willful. Prior to Thurston, many courts had interpreted willful as meaning intentional. See Wehr, 619 F.2d

at 282-83; Hodgson v. Hyatt, 318 F. Supp. 390, 392-93 (N.D. Fla. 1970) (FLSA case). Thurston developed a slightly different formulation, although it is clear that the Thurston standard for "willful" acts in terms of the liquidated damages provisions would not sweep in acts which were unintentional. See Wehr, 619 F.2d at 783 (court adopts standard of "intentional, knowing or voluntary" that is "used to characterize conduct marked by careless disregard whether or not one has the right to act." (quoting Hodgson)).

Congress clearly intended to create a two-tiered liability system in the ADEA. Thurston, 53 U.S.L.W. at 4028. Acts which are intentional are subjected to double damages. If the ADEA reached only to intentional acts, all violations would be subjected to double damages and there would be no two-tiered system.⁴

4 Even if Thurston established a more demanding standard for the imposition of double damages, it would not change my decision on this issue. If the Thurston standard were higher than merely intentional (and I do not believe that it is), it is apparent that too great a percentage of cases would be liable for double damages. That is, if the ADEA reached only to intentional acts, and even if the Thurston standard were greater than "intentional," there would be too great a percentage of the total number of ADEA cases triggering double damages. Congress clearly intended that the liquidated damages provisions apply to the exceptional case rather than the normal case. To adopt defendants' reading of the reach of the Act would in my view reverse this.

I therefore conclude that although the question is a close one, the ADEA does reach to disparate impact type of cases.

3. Disparate Impact and Compensation Cases

Defendants argue that even if the ADEA comprehends disparate impact type of cases, that theory itself does not reach to cases involving compensation systems.

It is certainly true that the disparate impact theory developed in cases involving challenges to job selection or promotion practices. The archetypal case is Griggs which involved a challenge to job application tests. Defendants argue persuasively that the theory should not be extended beyond the realm from which it sprang and that it is inapposite in a case challenging the operation of a compensation system such as the present case. In support of their position, defendants point to recent Supreme Court cases which cast some shadow over this area and to the recent Ninth Circuit decision in the Washington state comparable worth case.

In Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977), the Court stated: "[w]e again need not decide whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703(a)(1). . . . Griggs held that a violation of § 703(a)(2) can be established by proof of a discriminatory effect . . . [Section]

703(a)(1) . . . would appear to be the proper section of Title VII under which to analyze questions of sick-leave or disability payments." Although this language is not explicit, it does suggest that an attack on a compensation system must be brought under § 703(a)(1) of Title VII and that disparate impact has never explicitly been held to be viable under § 703(a)(1). Sections 703(a)(1) and (a)(2) correspond to §§ 623(a)(1) and (a)(2) of the ADEA.

Defendants also point to the recent decision of the Ninth Circuit in American Federation of State, County and Municipal Workers v. State of Washington, Nos. 84-3569, 84-3590, slip op. (9th Cir. Sept. 5, 1985) ("AFSCME"). In AFSCME the Ninth Circuit addressed the viability of the comparable worth doctrine under Title VII. The court reversed the district court's holding that plaintiffs could proceed under a disparate impact model. In reaching its decision the court stated: "[d]isparate impact analysis is confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job selection process. . . ." The instant case does not involve an employment practice that yields to disparate impact analysis. . . . A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard [v. Rawlinson], 433 U.S. 321 (1977) and Griggs; such a compensation system, the result of a complex of

market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory." Id.

Whatever the correctness of this discussion, the present case is distinguishable from AFSCME. The Ninth Circuit did not focus, as defendants do, on which specific subsection of Title VII supports a challenge to a compensation system. Rather, it looked to the nature of the challenge and the nature of the challenged practice. Plaintiffs in AFSCME had launched a broad-based challenge to the ways in which the defendant's compensation system had developed over many years. This development resulted, in AFSCME's eyes, in a discriminatory payroll system. Thus, there was no discrete event or practice which led to the alleged discriminatory result. In the instant case, the EEOC is challenging a specific event: the setting of the 1983-1984 salaries and the adoption of the compaction plan. These are single events and are not similar in nature to the operation of the "free market system" that the AFSCME defendants claimed was responsible for the creation of the pay disparities at issue in that case.⁵

⁵ Defendant GMEA has submitted a brief filed by the Civil Rights Division of the Department of Justice as amicus curiae in American Nurses Association v. Illinois, No. 85-1766 (7th Cir). Although it is interesting to see the position of the Civil Rights Division in the area of comparable worth, this brief has no weight in this proceeding and I have not considered it in my decision.

Whether the disparate impact model can be applied in a compensation case is a difficult, unsettled question. Fortunately, I need not decide it. Even if plaintiff could proceed in this case on such a theory, it has failed to meet its burden of demonstrating a prima facie case. Furthermore, defendants have come forward with valid, nondiscriminatory reasons for their actions.

4. Plaintiff's Disparate Impact Case

The ADEA was enacted to promote employment of older Americans and to remove arbitrary age discriminations in employment. See 29 U.S.C. § 621(b); EEOC v. Wyoming, 103 S. Ct. 1054 (1983). The Act's protections extend to all those in the protected age group, i.e., those between the ages of 40 and 70. The ADEA applies to state and local governments. 29 U.S.C. § 630(b)(2).

A plaintiff's burden in a disparate impact case is heavier than it would be in a disparate treatment case. Massarky, 619 F.2d at 120. In order to establish a prima facie case under the disparate impact model, the plaintiff must show "that the facially neutral employment practice had a significantly discriminatory impact." Connecticut v. Teal, 102 S. Ct. 2525, 2531 (1982). "If that showing is made the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to

avoid a finding of discrimination Even in such a case, however, the [plaintiff] may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." Teal, 102 S. Ct. at 2531 (quoting Griggs, 401 U.S. at 432). The employer has no burden to come forward with any justification until the plaintiff has made out a prima facie case. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Defendants contend that the plaintiff has not made out a prima facie case and that, even if it has, there are compelling business justifications that bring its actions within the "reasonable factors other than age" exception to the ADEA's prohibitions.

It seems beyond dispute that the salary steps in the GMSD are correlated with age. There is also no dispute that the individuals affected by the compaction system in the allegedly adverse way are all within the protected age group.

Defendants contend, however, that there has been no discrimination as a matter of law because the teachers at the most senior levels of the step system are also the highest paid. They contend that the EEOC has improperly focused on one aspect of the entire payroll system: the amount of the wage increases given for the 1983-1984 academic year.

It is not disputed that the oldest teachers in the GMSD are also the highest paid teachers. Defendants contend that this should essentially be the end of the inquiry. The EEOC on the

other hand sees the fact that the highest paid teachers received a lower salary increase than those below them on the salary ladder as discriminatory. Although the defendants' argument may be somewhat overbroad, I believe that the EEOC has failed to demonstrate any discrimination in the GMSD's salary system.

In essence the EEOC would find any salary-step system with a top salary to be discriminatory, despite its protestations to the contrary. In any system in which there are a limited number of steps, and in which the relative disparities between the highest and lowest salaries are held constant, those at the higher end of the salary system will receive a lower effective yearly increase than those who are still progressing from step-to-step. At oral argument on this motion, the EEOC conceded that it considered only an equal effective percentage increase to accord with the ADEA as it interprets it. Requiring an equal percentage increase across-the-board would, however, make the number of steps grow each year and would also mean that the gap between the highest and lowest teachers would grow continuously.

Defendants argue that the Supreme Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), requires the conclusion that it is improper to focus on just one aspect of the compensation system. In Gilbert, the Court was faced with a challenge to the health insurance benefits available to General Electric employees. The specific claim was that the health plan

did not cover maternity and pregnancy benefits. A class of female employees at General Electric sued claiming that this treatment of pregnancy benefits constituted a violation of Title VII. The Supreme Court held that it did not. Relying on Geduldig v. Aiello, 417 U.S. 484 (1974), the court held that a classification based on pregnancy was not equivalent to a classification based on sex. The Court also held that as long as the overall benefits available to employees under the insurance plan were equivalent, there was no discrimination. Defendants argue that this holding makes invalid any examination of the compensation system which does not look to the entirety of the payroll package.

Defendants have not been able to cite me any cases directly on point and the only cases I have located which apply Gilbert involve pregnancy benefits. See e.g., Women in City Government United v. City of New York, 563 F.2d 537, 540-41 (2d Cir. 1977); Guse v. J.C. Penney Co., 562 F.2d 6, 8 (7th Cir. 1977); Grogg v. General Motors Corp., 444 F. Supp. 1215, 1218-19 (S.D.N.Y. 1978). None of these cases is very strong support for defendants' position, notwithstanding the broad language contained in some of the opinions.

In spite of the lack of direct support for their position, I believe that the defendants are essentially correct that it would be improper to focus too narrowly on a particular aspect of something like a compensation system. Such a system is

designed to provide employees with an overall package of payroll benefits. The precise manner in which this is accomplished will obviously vary widely. It is true that the teachers at the top of the step system received the smallest increases, but they also received the highest pay. It is only when the amount of the pay increase is separated from all other aspects of the compensation system, and the amount given to the older teachers as opposed to the teachers with less seniority is examined in isolation, that anything remotely unusual can be seen. I believe that this dissection of the compensation system is improper.

The EEOC contends that Connecticut v. Teal prevents this conclusion. In Teal, the Court rejected an employer's reliance on a "bottom line" defense. Teal involved a challenge to job selection processes. The employer argued that even if its selection criteria were discriminatory, its work force was racially balanced and, therefore, the "bottom line" was that it was not discriminating. The Court rejected this argument. Its holding was predicated on its conclusion that the protections of Title VII applied to individual employees primarily rather than to a minority group as a whole. Id. at 453-54. In the instant case, the defendants argue that the total payroll package received by each individual teacher is nondiscriminatory and therefore that the "bottom line" to each teacher is nondiscriminatory. Teal therefore does not cover this

situation.⁷

Even assuming, however, that the EEOC has demonstrated a prima facie case,⁸ the defendants have come forward with reasonable factors other than age upon which their decisions were based. These alternative grounds for the decisions reveal the nondiscriminatory nature of the defendants' actions.

The defendant has suggested a number of reasons for the compaction plan. The primary reasons appear to be the desire to limit the number of steps so that teachers would eventually reach the top of the salary ladder; the desire to shorten the time necessary for a teacher to reach the top of the salary system, and the desire to enhance the professional status of the teachers by creating a more reasonable number of steps with a fixed top step.

Under the ADEA, it is not unlawful for an employer to differentiate among its employees based on reasonable factors other than age even if that differentiation would otherwise be a

7 Indeed, if Teal were to reach to this type of argument, it would conflict with the Court's holding in Gilbert.

8 The parties have spent a significant amount of energy discussing the impact of this case on other public sector salary systems including that of the federal government. Although I agree with defendants that there is no significant difference between the GMSD's system and that of the federal government, that fact standing alone is not material to this case.

violation of the Act. The actions taken by defendant fall within this exception.

Under the new system, all teachers reach the top of the salary system earlier than they would have otherwise. Moreover, even those at the top of the salary system were not harmed by the compaction plan. Those at step twenty-eight still received the highest salary in the system and still received a raise in salary equal to that received by all other teachers exclusive of step increases. The GMSD and the GMEA both had an equally valid desire to ensure that there would be no ever-increasing disparity between the highest and lowest paid teachers within the system. Under any approach acceptable to the EEOC, this result would be unattainable. Under the compaction plan, the overall earnings of all teachers would also be increased when considered as a career-long lump sum. Obviously, this is a valid goal of the GMEA.

The EEOC argues that all of these goals were achieved at the expense of the older workers in the system. I disagree with this characterization. Although the teachers between steps twenty-four and twenty-eight received less of an increase than those below them, this must always be so in any system in which there are fixed number of steps of set salary. Obviously, when an employee reaches the top step of such a system, she or he is no longer entitled to a step increase as before. This fact alone would not, in my view, render the system

discriminatory where there are valid business reasons for the fixed-step system. Defendants have demonstrated those reasons here.

Plaintiff argues, however, that this is precisely the type of bottom line defense rejected in Teal. Once again, however, I believe that this case is distinguishable from Teal. That case involved employee selection processes, not compensation. That fact alone may serve to distinguish Teal. It is also apparent that at least some of the individual teachers in steps twenty-four and above will also be the beneficiaries of the enhanced professional status attached to reaching the top level of the salary system. In addition, unlike the situation in Teal, defendants do not seek to justify discrimination against members of the protected class by pointing to the treatment given to other members of the same class.

This case is much more similar to Wambheim v. J.C. Penney, 705 F.2d 1492 (9th Cir. 1983) (per curiam), than it is to Teal. In Wambheim, the plaintiffs attacked the manner in which defendant distributed its insurance benefits. Penney had eliminated insurance coverage for spouses of Penney employees, unless the employee earned more than half of the combined income of the family. The result of this restriction was that wives of male employees were more often included within the plan than were husbands of female employees. Penney argued that these distinctions were made in order to benefit the largest number of

employees with the greatest need. It argued that another system would result in increased health insurance premiums which would make health insurance too expensive for those with low incomes.

The concerns expressed by the defendants are similar to those accepted by the court in Wambheim. Although they are not as compelling as those presented in that case, they reflect a desire to improve the lot of the most teachers possible. I believe that this end has been accomplished in a non-discriminatory manner. I will therefore grant defendants' motion for summary judgment and deny plaintiff's motion for partial summary judgment.

Handwritten signature: David H. Hyatt

Handwritten mark: J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

: CIVIL ACTION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

:

:

VS.

:

GOVERNOR MIFFLIN SHCOOL DISTRICT
and GOVERNOR MIFFLIN EDUCATION
ASSOCIATION

:

NO. 85-241

FILED OCT 10 1985

CIVIL JUDGMENT

Before HUYETT, J.

AND NOW, this 9th day of October, 1985

in accordance with the order dated October 9, 1985,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the
defendants and against the plaintiff.

ENTERED: 10-10-85

CLERK OF COURT

BY THE COURT:

ATTEST: Francis E. DeVine
Deputy Clerk

576
C.46

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

v.

GOVERNOR MIFFLIN SCHOOL
DISTRICT and GOVERNOR MIFFLIN
EDUCATION ASSOCIATION

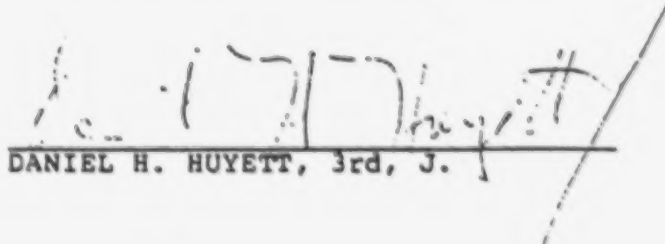
CIVIL ACTION

NO. 85-0241

ORDER

NOW, this 9TH day of October, 1985, upon considera-
tion of plaintiff's motion for partial summary judgment,
defendants' motions for summary judgment, the responses thereto,
memoranda of law submitted by the parties, and for the reasons
set forth in the accompanying memorandum, IT IS ORDERED that:

1. Plaintiff's motion for partial summary judgment is
DENIED.
2. Defendant's motions for summary judgment are
GRANTED.
3. Judgment is entered in favor of defendants and
against plaintiff.


DANIEL H. HUYETT, 3rd, J.

577

C.47

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

: CIVIL ACTION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

:

:

VS.

:

GOVERNOR MIFFLIN SHCOOL DISTRICT
and GOVERNOR MIFFLIN EDUCATION
ASSOCIATION

:

NO. 85-241

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AND NOW, this 9th day of October, 1985
in accordance with the order dated October 9, 1985,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the
defendants and against the plaintiff.

BY THE COURT:


ATTEST: Francis E. DeVine
Deputy Clerk

5788

Preventing And Defending Actions By School District Employees
presented by NSBA Council of School Attorneys
Hotel Meridien
San Francisco

THE ADEA

Preparing and Trying a Case

By

Ronald J. James
Partner

August 13, 1986

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I.

INTRODUCTION

A. The purpose of the Age Discrimination in Employment Act of 1968 (ADEA) -- the Title VII for older non-minority employees -- is to eliminate age discrimination in the work place. The goal of the Act, as expressed in Section 2(b), is:

to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

B. The reasons age discrimination lawsuits have tripled since 1978 ADEA Amendment (which codified the right to jury trial) are:

1. Demographics - Baby Boom Generation is now over 40;
2. Economic - Growth in some areas and reduction in others e.g., declining school enrollment and a shrinking tax base/support for schools;
3. Growing militancy of older workers;
4. The movement from an industrial society to an information society and the resultant job dislocation;

5. Increasing use of ADEA by employees with other causes of actions such as state common law claims for Wrongful Discharge Suits.
- C. The typical ADEA plaintiff is usually (75%) a white collar male (50 to 64) with an average compensation around \$33,000 annually who is challenging some form of termination action. (cf. November 26, 1982, Daily Labor Report p. A-11; Labor Relations Personnel Journal 30 (June 1984)).
- D. Most states (39) also have statutes proscribing age discrimination and may have different age limitations than the federal statute e.g., New York removed the age 70 cap as of January 1, 1986, and prospects are that the age 70 cap will be removed from ADEA.

II. ADEA Provisions & Procedures

- A. Prohibitions -- The ADEA makes it unlawful for an employer to fail or to refuse to hire, to discharge, or to otherwise discriminate against any individual between the ages of 40 and 70 with respect to compensation, terms, conditions or privileges of his employment, or to limit or classify an employee in any way which might deprive him of employment opportunities or adversely affect his status as an employee because of his age. 29 U.S.C. §§ 623(a); § 631(a). Executive Policy Maker

Exception Under ADEA. Certain executive and policy makers can be forced to retire under federal law at age 65.

- B. Coverage -- The Act applies to employers (20 or more employees), employment agencies regardless of size, and labor organizations (25 members) operating hiring halls which procure employees for an employer. Geographic coverage extends to those acts performed in places over which the United States has sovereignty, territorial jurisdiction or legislative control. 29 C.F.R. § 860.20. School Boards are covered as well as State and Municipal Governments. EEOC v. Wyoming 460 U.S. 226, 103 S. Ct. 1054 (1983). Cf., Garcia v. San Antonio Metro. Transit Authority, 105 S. Ct. 1005 (1985).
- C. Procedural Requirements -- Before initiating a suit, a plaintiff must comply with several procedural requirements set forth in the statute. Specifically a charge of unlawful discrimination must be filed with the EEOC within 180 days of an alleged unlawful practice, except that in those deferral states which have a statute like Ohio, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice. 29 U.S.C. §626(d).

1. In this area one can observe a spillover of the liberal treatment accorded plaintiffs under Title VII concerning the procedural barriers to suit. One should also note that the 1978 Amendments to the ADEA were designed to make it easier for plaintiffs to have their cases decided on the merits and not on procedural grounds.
2. The 180 day filing period is not jurisdictional, and may be tolled for equitable reasons. The Supreme Court, in a split per curiam opinion, upheld a 10th Circuit decision that the 180 day filing period is subject to the equitable concepts of tolling and estoppel. The 10th Circuit reached its conclusion based upon (1) an analogy to Title VII and (2) the remedial and humanitarian purposes of the Act, notwithstanding apparent decisions to the contrary by many courts. Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd, 434 U.S. 99 (1977). See, Wright v. Tennessee, 628 F.2d 949 (6th Cir. 1980). See also, Nysis v. T.W.A., 455 U.S. 385 (1982) (Title VII).
3. Only egregious misconduct on the part of the employer that (1) causes the notice to be

filed late and (2) warrants denying the employer the protection of the time limit, should be considered as extraordinary circumstances. See, e.g., United Air Lines, Inc. v. Evans, 431 U.S. 553, (1977); cf., Bonham v. Dresser Industries, Inc. 569 F.2d 187 (Employer failed to post EEOC ADEA Notice in conspicuous place), cert. denied, 439 U.S. 821 (1978).

4. The Supreme Court held that the 180 limitation period for the filing of a charge established in Title VII commences when the individual learns of the alleged discriminatory act, not when he begins suffering the effects of the alleged discrimination. Delaware State College v. Ricks, 449 U.S. 250 (1980). Thus, in Ricks, the Court held that a lawsuit was time barred because the only alleged discrimination occurred--and the filing limitation period therefore commenced--at the time the decision to discharge the plaintiff was made and communicated to him, even though the eventual loss of his teaching position did not occur until more than one year later. The Ricks decision has been applied to the ADEA. Anness v. Steelworkers, Inc., 27 EPD ¶ 32,195

(N.D. Ohio 1981); Pierce v. Green Giant Company, 26 EPD ¶ 32,074 (N.D. Texas 1981). See also, Needham v. Beecham, Inc., 26 EPD ¶31,869 (D. Maine 1981); Tobin v. Trans Union Systems Corp., 488 F. Supp. 622 (E.D. Pa. 1980).

5. Failure to file a timely charge of age discrimination may warrant dismissal of the suit. Anness v. Steelworkers, Inc., 27 EPD ¶ 32,195 (N.D. Ohio 1981); Pierce v. Green Giant Company, 26 EPD ¶ 32,074 (N.D. Texas 1981).
6. A suit may be filed before the EEOC has concluded its investigation, so long as no action is filed until 60 days after a charge is filed. 29 U.S.C. § 626(d).

D. Overall Statute of Limitations

1. The Portal-to-Portal Act amendment to the FLSA is applicable to ADEA cases so that suits must be filed within two years of the alleged wrongful act. 29 U.S.C. § 626(e)(1970). There is an exception for cases involving "willful" violations in which case the period is three years. 29 U.S.C. § 255 (1970).
2. The standard developed by the courts in FLSA cases by which to judge "willfulness" is whether the employer had knowledge that the

FLSA was "in the picture," in some cases notwithstanding that the employer acted in good faith. Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972).

3. Courts have been more lenient on employers in ADEA cases, defining a willful violation as requiring "bad faith." Bishop v. Jelleff Associates, 398 F. Supp. 579, 593 (D.D.C. 1974); Hodgson v. Ideal Corrugated Box Co., 10 FEP 744, 571 (N.D. W. Va. 1974).

E. Rule 23 Class Actions Precluded

1. Unlike the opt-out provision of Fed. R. Civ. P. 23, the ADEA provides for an "opt-in" procedure. 29 U.S.C. §§ 216(b) and 626(b).
2. The 5th Circuit, and an overwhelming majority of district courts, have held that the opt-out procedure of Fed. R. Civ. P. 23 is inconsistent with the opt-in procedure of the ADEA and is not available in ADEA cases. La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975); Watkins v. Milliken & Co., 613 F. Supp. 408, 419 (W.D. N.C. 1984); Lusardi v. Xerox Corp., 99 F.R.D. 89, 92 (D.N.J. 1983) (Rule 23 class actions are not available under the ADEA).

- a. A plaintiff who files on behalf of other similarly situated individuals may represent other individuals who have timely claims and have opted-in, even if the other individuals have not filed a charge with the EEOC. See, Mistretta v. Sandia Corp., 639 F.2d 588, (10th Cir. 1980).
- b. If the plaintiff's EEOC charge does not state that he or she is representing a class of similarly situated individuals, the plaintiff cannot commence a class action. See, McCorstin v. United States Steel Corp., 621 F.2d 749, 755-56 (5th Cir. 1980).
- c. Whether a plaintiff can notify other allegedly aggrieved individuals in order to encourage them to opt-in is an unresolved question, since the two circuit courts of appeals which have faced the issue have reached contrary results. Compare McKenna v. Champion International Corp. 747 F.2d 1211, 1214 (8th Cir. 1984); see also, Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977) (Fair Labor Standards Act case) (notice denied) with Braunstein v. Eastern

Photographic Laboratories, Inc., 600 F.2d 335 (2d Cir. 1979) cert. denied 441 U.S. 944 (1979) (Fair Labor Standards Act case) (notice approved).

F. Relief and Damages

1. The ADEA incorporates the remedial portions of sections 216 (except (a)) and 217 of the FLSA.
2. Back Pay - Section 216 authorizes unpaid minimum wages or overtime compensation.

3. Liquidated Damages

An equal amount of back pay as liquidated damages is also available where applicable. The ADEA provides that liquidated damages are payable only in cases of "willful violations." 29 U.S.C. § 626(b) (1970).

4. Definition of Willful

- a. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S. Ct. 613 (1985) held that an act is willful "if the employer either knew or showed reckless disregard of whether its conduct was prohibited by the ADEA." In this context, the 6th Circuit defined "willful" conduct as conduct which shows "that the employer was reckless in not knowing that his actions were governed by the ADEA or that

the employer acted in reckless disregard of whether his actions were covered by the ADEA." Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1184 (6th Cir. 1983).
Accord, Rogers v. Exxon Research and Eng'g Co., 550 F. 2d 834 (3rd Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

- b. Effect of TWA, Inc. v. Thurston, supra, on recent caselaw. McDowell v. Avtex Fibers, Inc., 740 F.2d 214 (3d Cir. 1984), vacated, 105 S. Ct. 1159 (1985); E.E.O.C. v. Prudential Federal Sav. and Loan Ass'n, 741 F.2d 1225 (10th Cir. 1984), vacated, 105 S. Ct. 896 (1985).

- 5. Additionally, the ADEA provides for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U.S.C. § 626(b), e.g. pension benefits, health insurance, savings plans, social security benefits, use of company car, expense account, stock bonus plan and lost seniority.

G. Availability of Compensatory and/or Punitive Damages

- 1. Weight of authority--compensatory damages are not available. Johnson v. Al Tech, Specialties Steel Corp., 731 F.2d 143 (2nd

Cir. 1984); Perrell v. Finance America Corp., 726 F.2d 654 (10th Cir. 1984); Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

2. The same rationale rejecting compensatory damages applies to punitive damages. See, Johnson v. Al Tech. Specialties Steel Corp., 731 F.2d 143 (2nd Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983); Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982).

H. Availability of Prospective Damages ("Front Pay") in Lieu of Reinstatement

1. Recent Trend. The issue of "front pay" has not been considered by the Supreme Court. However, the First, Second, Third, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have approved front pay award. See, Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985); Maxfield v. Sinclair International, 766 F.2d 788 (3rd Cir. 1985); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-29 (2d Cir. 1984) (conditioned on request for reinstatement); Davis v. Combustion Engineering, Inc., 742 F.2d 916 (6th Cir. 1984); Gibson v. Mohawk

Rubber Co., 695 F.2d 1093 (8th Cir. 1982);
Cancellier v. Federated Department Stores, 672
F.2d 1312 (9th Cir.), cert. denied, 459 U.S.
859 (1982); EEOC v. Prudential Federal Savings
and Loan Ass'n., 741 F.2d 1225 (10th Cir.
1984), vacated on other grounds, 105 S. Ct.
896 (1985), cert. denied, 106 S. Ct. 312
(1985); O'Donnell v. Georgia Osteopathic
Hosp., Inc., 748 F.2d 1543 (11th Cir. 1984).
Front pay held not appropriate; Goldstein v.
Manhattan Industries, Inc., 758 F.2d 1435
(11th Cir. 1985); Kolb v. Goldring, Inc., 694
F.2d 869, 874 n.4 (1st Cir. 1982). See also,
Loeb v. Textron, 600 F.2d 1003, 1021-23 (1st
Cir. 1979); Foite v. Suburban Bancorp, 549 F.
Supp. 264 (D.Md. 1982).

2. Factors in determining whether Front Pay is
appropriate:

1. speculative nature of award;
2. availability of replacement work;
3. feasibility of reinstatement. Courts
decline to offer reinstatement where it is
impracticable. Wildman v. Lerner Stores,
771 F.2d 605 (1st Cir. 1985); Beckwith v.
International Mill Services, Inc., Case
Nos. 84-1218, 84-1083, slip op. (E.D. Pa.

August 9, 1985).

4. miscellaneous - plaintiff's age, skill levels, local job market conditions.

3. "Reinstatement is the preferred remedy"

Maxfield v. Sinclair International 766 F.2d 788, 796 (3rd Cir 1985). In passing the ADEA, Congress reiterated that one of its basic purposes was "to promote employment of older persons based on their ability rather than age." The legislative history of the ADEA is replete with comments by all concerned parties that the dignity of the older working American be preserved by maintaining employment opportunities for them. Thus, the case law of the many circuits holding that reinstatement is the preferred remedy is in keeping with the intent of Congress in shaping and passing this legislation. n.3 29 U.S.C. § 621. It is apparent that the issue of front pay damages will be decided on a case by case basis.

I. Attorney fees and litigation costs are available to prevailing ADEA plaintiff. 29 U.S.C. § 626(g)

III. Burden of Proof/Substantive Law

A. ADEA Disparate Treatment Theory of Discrimination

1. The "Disparate treatment" theory (developed under Title VII) is where "the employer simply

treats some people less favorably than others because of their [Age]." Teamsters v. United States, 431 U.S. 324, 325-36 n.15 (1977).

2. Some Courts have concluded there are three ways a plaintiff can prove a prima facie case of disparate treatment:

- (a) direct evidence of intent
- (b) statistical evidence
- (c) proof in accordance with the following formula originally set out in McDonnell Douglas v. Green, 411 U.S. 792 (1973).

B. A plaintiff always has the burden of persuasion in an ADEA action. He or she must initially establish a prima facie case of age discrimination by proving, as a general rule, (Cf., McDonnell Douglas v. Green, 411 U.S. 792 (1973)), the following four elements:

- 1. He or she was in the protected age group of 40 to 70;
- 2. He or she was performing the job at a level that met the employer's legitimate expectations;
- 3. He or she was nevertheless discharged (or not hired, promoted, etc.);
- 4. The employer sought someone to perform the

same work after he or she was discharged (or not hired, promoted, etc.).

See, Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979) (prima facie requirements, however, may be modified in individual cases). See also, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (Title VII case); Sahadi v. Reynolds Chemical Co., 636 F.2d 1116 (6th Cir. 1980). In reduction-in-force cases, it is unnecessary for the plaintiff to prove that the employer sought someone to perform the same work after the plaintiff was laid off. See, McCorstin v. United States Steel Corp., 621 F.2d 749, 753-54 (5th Cir. 1980). In such a case, one circuit court has stated that the laid off employee, in order to establish a prima facie case, must "produc[e] evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision." See, Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).

- C. Some courts have held that the above criteria should not be applied mechanically. Laugesen v. Anaconda Co., 510 F.2d 1116 (6th Cir. 1975). Thus,

statistical information, direct evidence of discrimination, and/or circumstantial evidence may be used to prove that the employee was discharged "'under circumstances which give rise to an inference of unlawful discrimination.'" Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Accord, Blackwell v. Sun Elec. Corp., 696 F. 2d 1176 (6th Cir. 1983); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982).

D. If the plaintiff succeeds in establishing a prima facie case, then the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the personnel action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The employer need not prove his case; he need only state a valid reason for his action.

1. Reorganization and/or employer eliminated the job or operations curtailed.
Baldwin v. Sears, Roebuck & Company, 667 F.2d 458 (5th Cir. 1982) (no prima facie case where employer combines two groups into one and eliminates position but younger employees perform the job); Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2d Cir. 1981); Stock v.

Horsman Dolls, Inc., 27 EPD ¶ 32,275 (D.S.C. 1981). But see, Tribble v. Westinghouse Electric Corp., Inc., 669 F.2d 1193 (8th Cir. 1982) (younger employees assumed duties pursuant to corporate reorganization sufficient to establish claim). See also, Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978); Moses v. Falstaff Brewing Corp., 550 F.2d 1113 (8th Cir. 1977); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976).

2. Employee voluntarily selects/accepts early retirement after considering options.

Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, (6th Cir. 1982); Sills v. Fort Pitt Steel Casting Co., 24 FEP 927 (W.D. Pa. 1979) (employee voluntarily resigned), aff'd mem., 633 F.2d 211 (3d Cir. 1980); Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970).

3. Employer had valid reason, or good cause, for the action.

- a. Substandard performance or negative attitude.

Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981); EEOC

- v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Magruder v. Selling Areas Marketing, Inc., 439 F. Supp. 1155 (N.D. Ill. 1977) (carelessness and serious errors).
- b. Murder of co-worker.
Carter v. Maloney Trucking & Storage, Inc., 631 F.2d 40 (5th Cir. 1980).
- c. Serious violation of company policy.
Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir. 1980) (intentional misapplication of customer's funds).
- d. Lack of cooperation with supervisors or co-workers.
Erwin v. Bank of Mississippi, 512 F. Supp. 545 (N.D. Miss. 1981); Kerwood v. Mortgage Bankers Association, 494 F. Supp. 1298 (D.D.C. 1980).
- e. Lack of confidence in employee's ability.
Carolan v. Central Freight Lines, Inc., 489 F. Supp. 941 (E.D. Tex. 1980). See also, Cova v. Coca Cola Bottling Comp., 574 F.2d 958 (8th Cir. 1978) (customer complaints).
- f. Drinking on the job.
Peterson v. Colonial Stores, Inc., 19 EPD

¶ 8,992 (N.D. Ga. 1979) (severe offense because employee was pilot).

- g. Age results in decline in ability to perform.

Marshall v. American Motors Corp., 20 FEP 575, 579 (E.D. Mich. 1979). See also, Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981) (financial mismanagement of store); Sahadi v. Reynolds Chemical, 636 F.2d 1116 (6th Cir. 1980).

- h. Abuse of Patients.

Reich v. New York Hospital, 27 FEP 1639 (S.D.N.Y. 1981).

- i. Lack of supervisory qualifications for a combined job under reorganization.

Smith v. Farah Manufacturing Co., 650 F.2d 64 (5th Cir. 1981).

- j. Poor job performance or lack of initiative and knowledge of the techniques required of the job.

Meyer v. C & H Sugar Co., 27 FEP 1175

(9th Cir. 1981) (employee's racist statements made it difficult for him to function as effective personnel assistant); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977).

- E. If the employer articulates a legitimate nondiscriminatory reason for its actions, the employee must prove that the articulated reason was a mere pretext, a cover-up for age discrimination. Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).
1. Statistical data showing older employees adversely affected by personnel policy or particular decision-maker.
 2. Younger employees treated differently for the same or similar activity. Douglas v. Anderson, 27 FEP 47 (9th Cir. 1981) (plaintiff failed to show that termination was pretextual where employer established financial mismanagement as basis for decision); Hughes v. Black Hills Power & Light Co., 588 F.2d 918 (8th Cir. 1978) (discharge for failure to perform duties and deficiencies in warehouse under his supervision was not pretextual).

F. Burdine does not apply to employer defenses other than good cause. The following defenses must be proved affirmatively by the employer.

1. DEFENSE - Bona fide occupational qualification, (B.F.O.Q.), reasonably necessary to the normal operation of the business. 29 U.S.C. § 623(f)(1).

a. Narrow defense of limited application primarily where the public's safety is at issue.

Hodgson v. Greyhound Lines Inc., 499 F.2d 859 (7th Cir. 1974) cert. denied, 419 U.S. 1122 (1978); Usery v. Tomiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 370 (4th Cir. 1980) (en banc), cert. denied, 450 U.S. 965 (1981).

b. Compare Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981) (age forty maximum hiring age for pilots upheld as reasonably necessary for promoting safety), with EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982) (mandatory retirement at age 65 for fire chief not B.F.O.Q. because risk of heart

attack determinable on individual basis, court applies defense to position of fire chief rather than occupation of fireman); Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981) (rejecting defense because no evidence showing substantially all flight attendants older than thirty-five would be unable to perform in a safe manner at their job), cert. denied, 456 U.S. 1007 (1982); EEOC v. County of Los Angeles, 526 F. Supp. 1135 (C.D. Cal. 1981) (thirty-five year age limitation for new sheriffs is not a B.F.O.Q.). Johnson v. Mayor and City Council of Baltimore, 86 L.Ed 286 (1985), (the City of Baltimore policy of mandatory retirement at age 55 for most Baltimore city firefighters rejected).

- c. Defense should be used cautiously because it is an admission that the personnel policy violates the Act.

Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591 (5th Cir. 1978).

- d. Employer must show that there is a

factual basis for believing all or substantially all employees could not perform the job safely and efficiently or that it is impossible or highly impractical to determine which individuals could perform safely and that the job qualifications are reasonably necessary to the essence of the business.

Western Airlines, Inc. v. Croswell, 105 S. Ct. 2743 (1985); EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982); Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982); 29 C.F.R. § 625.6(b) (EEOC Guidelines).

2. Defense - Reasonable factor other than age, (R.F.O.A.), 29 U.S.C. § 623(f)(1), is a denial of plaintiff's claim and may be equated with the "good cause" defense. To call it an exception to the ADEA is somewhat of a misnomer as the principle presumes the employer acted on the basis of R.F.O.A. - cf. III, C, 3 supra.

- a. Economic factors of higher costs imposed by the employment of older workers may not be a valid defense.

Geller v. Markham, 635 F.2d 1027, 1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); 29 C.F.R. § 1625.7(f).

- b. Plaintiff need not show that age was the sole factor but must prove that it was a determining factor; "but for" the consideration of age, the personnel decision would not have occurred.

Bentley v. Stromberg-Carlson Corp., 638 F.2d 9, 12 (2d Cir. 1981); Kelly v. American Standard, Inc., 640 F.2d 974, 984 (9th Cir. 1981); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.), cert. denied, 454 U.S. 860 (1981); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

3. Defense - Observance with the terms of a bona fide seniority or pension plan that is not a subterfuge for illegal discrimination is permitted pursuant to 29 U.S.C. § 623(f)(2) providing that an employee is not compelled to retire prior to age seventy.

Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), cert. denied, 451 U.S. 986 (1981).

1. Prior to 1978 amendments, a pension plan could

require early involuntary retirement. This rule is applied to claims arising prior to the effective date of the Act.

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977); Aldendifer v. Continental Air Lines, Inc., 650 F.2d 171 (9th Cir. 1981); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), cert. denied, 451 U.S. 982 (1981); Sikora v. American Can Co., 622 F.2d 1116 (3d Cir. 1980).

2. Employers have the burden of proving that the plan is bona fide and that it was motivated by non-age based reasons. It is insufficient that a reduction in the retirement age was motivated by a desire to increase employee morale by creating opportunity for promotions. EEOC v. Home Insurance Co., 672 F.2d 252, (2d Cir. 1982); EEOC v. Eastern Airlines, Inc., 474 F. Supp. 364 (S.D. Fla. 1979). See also, United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977) (subterfuge is equated to a "scheme, plan, stratagem or artifice of evasion"); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), cert. denied, 451 U.S. 982 (1981) (plan is legitimate if it provides for economic security for retiring

employees).

3. Defense permits employers to provide fewer benefits to older workers if justified by the costs of such benefits.
4. Summary judgment is appropriate where the bona fide nature of the plan is not in dispute and the personnel action is taken pursuant to the plan.

IV. The Jury Trial Milieu

- A. Perhaps one of the most significant differences between the ADEA and Title VII is that an individual plaintiff (but not a federal employee) in an ADEA suit has a right to a jury trial. 29 U.S.C. § 626(c)(2). Consequently, an employer facing an ADEA suit may bear a far greater risk of a finding of liability and far more exposure to large verdicts for plaintiffs. Indeed, an attorney representing the employer in an ADEA suit must deal with the emotions of a jury, many of whom are within the protected age group or, if not within the protected age group at the time, know that they will eventually be so. Similarly, it is more than likely that the judge will also be part of the protected age group. These intangible factors must be recognized and accounted for by any employer who decides to vigorously defend an age suit. In

short, an ADEA suit brings with it an uncertainty not present in Title VII suits.

B. Pre-Conditions to Jury Trial; Avoiding Jury Trial

1. FRCP 38(b) provides:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue.

Such demand may be enclosed upon the pleading of the party." (Emphasis added).

2. FRCP 38(d) provides:

"The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury." (Emphasis added.)

3. The statutory right to a jury trial is waived unless timely filed within ten days [or fourteen days under Ohio Rule of Civil Procedure 38(B)]. Relief from waiver from FRCP 39(b) is not readily granted. More than oversight or inadvertence is required to obtain relief.

See, Mardesich v. Marciel, 538 F.2d 848, 849 (9th Cir. 1976); Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975).

4. See also local rules for requirements re demand for jury trial.
5. Requirements of Rule 38(b) are "a trap for the unwary." File answer promptly to commence ten-day [or fourteen days under Ohio Rule of Civil Procedure 38(B)] period running.

C. Jury Issues in ADEA Cases.

- a. Court determines whether to award remedy for reinstatement. Francis v. Dietrick, 682 F.2d 485 (4th Cir. 1982); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); See also, Lorillard v. Pons, 434 U.S. 575 (1978) (In footnote eleven, jury trial restricted to legal issues.)
- b. Does jury determine if violation is "willful" for purpose of liquidated damages, and, if so, the amount to be awarded? Liquidated damages are payable "only in cases of willful violations," 29 U.S.C. § 626(b), and liquidated damages are defined as an amount equal to the amount of unpaid minimum wages or unpaid overtime compensation. 29 U.S.C. § 216(b). Cases have held that award of liquidated damages is

discretionary, rather than mandatory, despite a finding of willfulness. Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977); Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Combs v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).

- c. Does jury determine whether violation is "willful" for purpose of determining applicable statute of limitations? ADEA incorporates statute of limitations of Portal-to-Portal Act applicable to FLSA. 29 U.S.C. § 626(a). Two years statute of limitations generally, except that it is three years where violation "willful." 29 U.S.C. § 255(a).
- d. Jury in any event would not determine award of attorneys' fees. § 16(b) of FLSA, 29 U.S.C. § 626(b), provides:

"The court in such action shall . . . allow [a prevailing plaintiff] a reasonable attorney's fee to be paid by the defendant, and costs of the action."

(Emphasis added).

D. EEOC (Plaintiff) the Right to a Jury Trial?

Four Circuits have affirmed the EEOC's (plaintiff) right to a jury trial in ADEA cases: EEOC v. Chrysler Corp., 759 F.2d 1523, 37 E.P.D. ¶ 35,225

(11th Cir. 1985); EEOC v. Ford Motor Co., 732 F.2d 120, 34 E.P.D. ¶ 34,310 (10th Cir. 1984); EEOC v. Brown & Root, Inc., 725 F.2d 348, 33 E.P.D. ¶ 34,191 (5th Cir. 1984); and EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 32 E.P.D. ¶ 33,860 (3d Cir. 1983).

E. Jury Selection.

1. The importance of the selection of jurors should not be underemphasized. Generally, plaintiff in an age case will attempt to empanel a homogeneous group, since it is easier to convince a group with already similar notions. Conversely, a defense attorney generally wants a more diverse group of individuals on the panel. There is some value of having one or two older individuals on the panel--in an attempt to avoid perceived pattern of getting rid of all the older people on the jury. As to other members of the panel, a defense attorney generally should seek younger, lower-income workers, or well educated persons.

2. Voir Dire.

a. In most federal courts, the judge will conduct voir dire, relying to a greater

or lesser degree on questions submitted by counsel. Fed. R. Civ. Proc. 47(a). Most state courts allow counsel wide latitude in interrogating the jury.

- b. Jury selection is not really a process of selection but a process of elimination. Consider eliminating prospective jurors who have had unhappy relationships with their employers, have been terminated, laid-off or reprimanded. Voir dire is also a time to establish rapport with the future fact finders and acquaint them preliminarily as to the facts and the law of your case.
- c. The defense counsel must always remember that the jury will have natural concerns regarding the aging process and therefore be psychologically predisposed to sympathizing with plaintiff. Voir dire can be effectively used to screen out potential jurors who are significantly concerned with the aging process and to avoid jurors who were subjected to involuntary retirement.

F. Taking the Case Away From the Jury.

1. 12(b) Motions. If a case is brought in federal court (for example, in a combined age discrimination/wrongful discharge case), Rule 12(b) can be utilized by the defendant to attack the complaint on the grounds of: "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19."
2. Motion for summary judgment should be filed whenever there is a factual basis of support; even if it is not granted, the judge will be educated regarding the legal issues and burdens of proof that plaintiff must satisfy at trial:
 - a. Summary judgment is appropriate when the discovery discloses that plaintiff cannot sustain his burden of proof with respect to each element of the prima facie case or where there is no dispute regarding the legitimacy of the employer's decision.

Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980) (per curiam), cert. denied, 450 U.S. 959 (1981)); Stock v. Horsman Dolls, Inc., 27 EPD ¶ 32,275 (D.S.C. 1981); Sills v. Fort Pett Steel Casting Co., 24 FEP 927 (W.D. Pa. 1979), aff'd mem., 633 F.2d 211 (3d Cir. 1980); Peterson v. Colonial Stores, Inc., 19 EPD ¶ 8992 (N.D. Ga. 1979);

b. Partial summary judgment may also be used to strike surplus issues or portions or counts of the complaint. See Appendix I -

- Exerpts: Motion for Summary Judgment.

3. Motion for directed verdict pursuant to Fed. R. Civ. P. 41(b) should be made at the conclusion of plaintiff's proofs. Nothing is lost by making this motion where plaintiff has failed to establish a prima facie case, the judge should grant the motion thereby avoiding the risk of jury sympathy verdict.

Kentroti v. Frontier Airlines, 585 F.2d 967 (10th Cir. 1978).

4. A motion for a directed verdict should be renewed at the conclusion of the evidence. Fed. R. Civ. P. 50(a)(b).

McCuen v. Home Insurance Co., 633 F.2d 1150
(5th Cir. 1981); Sahadi v. Reynolds Chemical,
636 F.2d 1116 (6th Cir. 1980).

5. Judgment notwithstanding the verdict (J.N.O.V.)
should be sought where the evidence is patently
inconsistent with the jury finding in favor of
plaintiff. Fed. R. Civ. P. 50(b).

Houser v. Sears, Roebuck & Co., 627 F.2d 756
(4th Cir. 1980).

V. Pre-Trial Considerations

- A. Discovery is critical in ADEA claims. Prompt discovery will provide the employer with the plaintiff's theory of recovery and make it possible to identify the specific information that will be needed to defend the case. In addition, it provides a basis for discrediting plaintiff's testimony at trial if new theories or facts are presented.

1. Depositions-Committing Plaintiff To The Facts
 - a. Deposition of the plaintiff should be conducted early -- preferred approach in virtually all cases. Unsubstantiated beliefs that a personnel practice is motivated by age discrimination are insufficient to withstand a motion for summary judgment. Special efforts should be made

to receive admission that age was not a real factor in the decision but merely subjective speculation of the plaintiff. See, Locke v. Commercial Union Ins. Co., 676 F.2d 205 (6th Cir. 1982) (plaintiff's conclusory statements insufficient to establish prima facie case); Stock v. Horsman Dolls, Inc., 27 EPD ¶ 32,275 (D.S.C. 1981) (plaintiff's assertion that "He can think of no other reason that might explain his dismissal," insufficient to withstand summary judgment motion where depositions and interrogatories are devoid of evidence to support an inference of discrimination); Minor v. Lakeview Hospital, 434 F. Supp. 633 (E.D. Wis. 1977), aff'd mem., 582 F.2d 1284 (7th Cir. 1978) (motion granted in race discrimination claim where no facts to establish inference of discrimination).

- b. An early deposition also permits counsel to evaluate the plaintiff as a witness, and to determine how the plaintiff will stand up under cross-examination. How well plaintiff conducts himself in deposition often determines settlement posture.

- c. Also consider taking plaintiff's deposition immediately preceding trial to update mitigation of damages information. This practice may assist in obtaining inconsistent statements.
- d. In federal court, defendant may wish to couple a Notice of Deposition (Rule 30) with a Notice and Request to Produce Documents pursuant to Rule 34. The notice periods for Rules 30 and 34 differ, since Rule 30 states no specific notice period for depositions, but Rule 34 provides a 30-day response time for document production. Hence, defense counsel may wish to provide in the deposition notice that the deposition shall continue from day to day and be subject to resumption after documents are produced. This may enable defendant to obtain priority in taking plaintiff's deposition while adhering to the time requirements set forth in Rule 34. Such a procedure is also useful where local district rules provide for mandatory document production shortly after the answer is filed.

2. Interrogatories should be promptly served and should address the following issues:
 - a. Specific factual circumstances and incidents of discrimination upon which plaintiff relies to support his claim;
 - b. Whether plaintiff intends to submit statistical evidence or expert testimony at trial;
 - c. Each element of damage and the amount sought by plaintiff;
 - d. Plaintiffs efforts to mitigate damages;
 - e. Witness list including substance of their testimony;
 - f. Can be used effectively in concert with request for admission to narrow issues. However requests for admission in Federal Court should be served separately; Fed. R. Civ. P. 36;
 - g. Beware of local rules limiting the number of interrogatories which can be served at one time or in the aggregate.
 - h. Interrogatories and further requests for documents may be served after deposition to ensure that defendant has elicited all plaintiff's claims and refined any vague

answers. Plaintiff has a duty to supplement such answers as information becomes available. FRCP 26(e).

B. Best to know bad news as soon as possible--Therefore, the employer should obtain all employment records in the appropriate department to prepare comparative data to support the legitimacy of the personnel decision and to prepare the defense.

1. Objective comparative data is frequently the most persuasive evidence for justifying a personnel decision.

a. In-house audit provides general statistics in preparation for reduction in force.

b. Objective performance evaluations support decision or inflated evaluations.

2. Subjective decisions and evaluations should be quantified wherever possible.

3. Review EEOC's Investigative file.

C. Use of Statistics?

Statistics may be used to support the inference of discrimination in ADEA cases.

1. Statistics must be validated to obtain probative evidence through the use of a coefficient or regression analysis.

See, EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).

a. Sample size must be large.

Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980)

(larger wage increases for younger workers may be the result of faster progress and experience).

b. Age discrepancy must be large. Morelock v. NCR Corp., 586 F.2d 1096, 1107 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1319 (E.D. Mich. 1976).

2. Statistics should be avoided unless overwhelmingly favorable or necessary to rebut plaintiff's statistics.

a. Gathering statistics is expensive and frequently can be discredited by the opposition.

b. Statistical presentations to the layman juror can be boring.

3. More evaluation about the use of statistics.

a. Statistics may be less reliable in age

discrimination claims than in other discrimination claims because even in the absence of discriminatory intent, older employees will be replaced by younger workers because older workers are constantly moving out of the labor markets while younger workers move into the workforce. Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975); Paxton v. Lanvin-Charles of the Ritz, 19 FEP 194, 196 (S.D.N.Y. 1978)

(substantial increase in workforce may explain a decrease in the age of the workforce). Cf., Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

- b. Statistics comparing ages over the course of time are particularly unreliable because the average age of the workforce increases each year; therefore snapshot or time static statistics are the most reliable. However, statistics alone may be used to establish a prima facie case where the disparities are glaring.
- Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981).

c. One scholar has stated disparate impact and related statistics is not a proper theory upon which to predicate liability under the ADEA. A. Blumrosen, Interpreting the ADEA: Intent or Impact.

D. Use of Experts?

Most frequently used to support application of a mandatory age requirement (BFOQ) e.g. Johnson v. American Airlines, 745 F.2d 988 (5th Cir. 1984) cert. denied, ___ U.S. ___, S. Ct. 3500 (1985).

E. Offer of Judgment? Fed. R. Civ. P. 68 (see Appendix II).

VI. Trial Tactics -- Practical Considerations

A. Opening statements should succinctly set forth the claims, the identity of the witness in chronological order, the nature of their testimony and the legal theories which support the position. Let jury hear any bad news from defense counsel. Counsel should guard against overstating the case. Emphasize:

1. The decision makers were individuals;
2. That plaintiff goes first and "give us a chance -- wait to hear our side";
3. That plaintiff was warned and given a chance to walk a measured mile before the TERMINATION.

4. That effective job performance and not age discrimination was the issue at TERMINATION.

B. Presentation.

The case should be presented in cogent and coherent form emphasizing the legitimacy of the personnel policy or decision:

1. Develop (one) theory of defense.
2. Identify the appropriate comparison groups and witnesses who have knowledge of the personnel practices.

- C. Motions in Limine - use to force/focus on the issue or issues, e.g. statements which have no direct relationship and risk prejudice are not admissible. Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984) (see Appendix III).

- D. Cross-examination of plaintiff should be limited because of predisposed sympathies which result in the perception that attorney is attacking plaintiff.

E. Objections.

- F. Closing statements should summarize the testimony, restate a brief synopsis of the theory of the case or the legal issues and factual determinations which must be made by the jury, identify all weaknesses in plaintiff's theories but generally never attack the plaintiff, and stress that the ADEA does

not require preferential treatment for older workers. Reference to opening statement should be made and a practical guide is that an outline of the closing argument should be prepared at the same time the opening statement is made.

- G. Jury instructions should be carefully drafted to emphasize/places burdens of proof on plaintiff, distinguish facts that are disputed from those which are not disputed:
 - 1. Prepare instructions well in advance of plaintiff to assist in framing discovery and theories of case.
 - 2. When possible utilize jury instruction which made use of appellate court employment cases rather than the last set used by your office mate.
- H. Special interrogatories are particularly appropriate to emphasize that age is a "but for" factor in the personnel policy, to determine whether the employer's action was willful for purposes of determining whether liquidated damages are appropriate, and to specify the amount of damages awarded for particular items of injury. In complex cases special interrogatories may help clarify the issues and simply the decision for the jury.

VII. Age Suits in State Court

- A. Ohio Revised Code (O.R.C.) § 4101.17 makes it unlawful for an employer to discriminate in any job opening against any applicant or discharge without just cause any individual between the ages of forty and seventy who is physically able to perform the duties and otherwise satisfies the requirements of the job. O.R.C. § 4101.17(A) (as amended) (1979).
- B. Any individual between the ages of forty and seventy who has been discriminated against in any job opening or discharged without just cause may institute a civil action against an employer. O.R.C. § 4101.17(B) (1979).
- C. This section, however, nowhere provides that such a civil action shall be a trial by jury, and it is clear that under O.R.C. § 4101.17, it is the province of a court, not a jury, to determine whether this section has been violated. The relief portion of the statute, § 4101.17(B), states, "the court," not a jury, is authorized to fashion an order granting an "appropriate remedy." Included as "appropriate" remedies are those equitable in nature, which only a court has authority to grant. Courts that have addressed the issue of whether a plaintiff is entitled to a jury trial under § 4101.17 have held there is no such right.

1. In Ross v. General Tire International Co., C.A. No. 11671, slip op. (Ohio Ct. App. October 24, 1984) the Ninth Appellate District Court of Appeals held that:
"The language of this statute does not provide for a jury trial. Rather, it implies that the age discrimination issue is to be tried to the court. Since the right to a jury trial was not provided by statute, the trial court did not err in denying Ross's jury demand." (at p. 2).
2. In Kegarise v. Buckeye Union Insurance Co., Case No. 81-CV-01-40, slip op. (Franklin Cty. C.P. Ct. March 29, 1981) the Franklin County Court of Common Pleas held that § 4101.17 clearly indicates that the proceeding is to be before the court, and therefore struck defendant's jury trial demand.
3. In Corell v. Cleveland Zoological Society, (1983 Journal Entry) Case No. 43448, the Cuyahoga County Court of Common Pleas reached the same result.
4. In Piecuch v. Gulf & Western Manufacturing Co., 40 EPD ¶136,164 (N.D. OH 1986), the United States District Court for the Northern District of Ohio reached the same result.

5. Most recently, demands for a jury trial of Section 4101.17 claims were struck in Alderson v. Avon Products, Inc., 36 EPD ¶135,010 (Summit Co. C.P. 1985), and Wayne v. Consolidated Rail Corp., Case No. 85-0479, Slip op. (Lucas Co. C.P. May 31, 1985).

VIII. Pendent State Claims

- A. Plaintiffs filing suit under the ADEA are increasingly seeking to append to the ADEA actions state common law claims for wrongful discharge or infliction of emotional distress thereby broadening the scope of the issues to be tried. Moreover, since many of these state claims are based on tort, with the concomitant potential for punitive damages, the potential liability on the part of an employer is increased. Accordingly, it can be expected that plaintiff's attorneys will, with more frequency, seek to invoke--and defense attorneys will continue to oppose--a federal court's pendent jurisdiction over such claims.
- B. In general, the assertion of state claims for wrongful discharge involve two issues: (1) are the claims within the pendent jurisdiction of the federal court, and (2) does state law recognize a claim for wrongful discharge.

- C. Defense counsel must evaluate whether it is advisable to move to strike pendent state wrongful termination claims on the ground that such claims do not arise out of a "common nucleus of operative facts." United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Defense counsel can argue that judicial economy, convenience and fairness to litigants, the predominance of state issues and jury confusion all argue for dismissal of defendant's state claims. The court in Gibbs noted that pendent jurisdiction "need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." Id. at 726. Federal district courts have treated pendent state claims in employment cases with differing results.
- D. Weight must be given to the possible burdens of defending a second lawsuit in state court, if the pendent claims are dismissed. Such duplicative actions, often involving overlapping facts brought to trial on different schedules, may complicate defense. This might occur, for example, where simultaneous overlapping discovery is pursued by the plaintiff.

*The author, Ron James, has been a partner in the Cleveland office of Squire, Sanders and Dempsey since 1977 and specializes in all aspects Labor-Litigation in the public and private sector. Previous Administrator, Wage and Hour Division with responsibility for the nation-wide enforcement of the Fair Labor

Standards Act, The Equal Pay Act, Age Discrimination in Employment Act, Child Labor Act plus various other federal labor protective legislation, 1972-1974, Assistant General Counsel, Equal Employment Opportunity Commission.

B.A. University of Missouri; M.S. Southern Illinois University; J.D. American University, Washington College of Law.

*The author gratefully acknowledges the updating, research, editing and revisions by John C. Kairis, Summer Associate, Squire, Sanders & Dempsey, Ohio State University, College of Law, Class of 1987.

APPENDIX I

Excerpts: Motion for Summary Judgment

According to her deposition testimony, plaintiff first learned of alleged sex discrimination in compensation and equipment in her first year of employment. [REDACTED] Depo at 60, 122] Similarly, plaintiff testified that it was during the fall, 1980 and spring of 1981, that she began feeling that she was a victim of age discrimination. [REDACTED] Depo at 121] It was not until December 15, 1982, however, that plaintiff filed a charge of discrimination with the EEOC. [REDACTED] Affidavit, Exhibit G].

III. LAW AND ARGUMENT

A. Introduction

Rule 56(b) of the Federal Rules of Civil Procedure provides that a defending party may move for the entry of summary judgment in its favor on any complaint. Under the Federal Rules:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Rule of Civil Procedure 56(c).

In the present action, based upon all pleadings, depositions, the exhibits introduced at the depositions, and the Affidavits and Exhibits attached to this Motion, it is clear that the Board is entitled to the entry of judgment in its favor as a matter of law.

B. Plaintiff's Claims are Barred by Her Failure to File a Charge of Unlawful Discrimination with the EEOC Within 180 Days of the Date of the Alleged Unlawful Practices.

Both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA") require an individual to file a charge of

discrimination within 180 days of the alleged unlawful practice. 29 U.S.C. §626(d); 42 U.S.C. §2000e-5(e). Where a charge is not filed within 180 days, it is proper for the court to dismiss the suit. Delaware State College v. Ricks, 449 U.S. 250 (1980) (Title VII); Barnett v. Manpower, Case No. C82-47 (N.D. Ohio July 8, 1982) (opinion attached) (ADEA); Pierce v. Green Giant Co., 26 EPD ¶32,074 (N.D. Tex. 1981) (ADEA).

The Supreme Court recently held that the 180-day limitation period established in Title VII commences when the individual learns of the allegedly discriminatory act, not when he begins suffering the effects of the alleged discrimination. Delaware State College v. Ricks, supra. In Ricks, plaintiff alleged that he was unlawfully denied tenure because of his national origin. The district court dismissed the complaint, finding that plaintiff failed to file a timely charge of discrimination. The district court held that the 180-day limitation period established in Title VII began to run when plaintiff was notified of the tenure decision, even though he taught for one year after receiving that notice. Id. at 255. The Court of Appeals for the Third Circuit, however, reversed the district court, finding that the limitations period did not begin until the last day of his employment with the College.

The Supreme Court rejected the reasoning and holding of the Third Circuit and held that the 180-day limitations period of Title VII commenced to run at the time the plaintiff was notified of the defendant's decision to deny him tenure. Id. at 259. The Court stated:

"In sum, the only alleged discrimination occurred -- and the filing limitations period therefore commenced -- at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure -- the eventual loss of a teaching

position — did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar case, that '[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.' Abramson v. University of Hawaii, 594 F.2d 202, 209 (1979) (emphasis added); see United Air Lines, Inc. v. Evans, 431 U.S. at 558. It is simply insufficient for Ricks to allege that his termination 'gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination.' Id. at 557. The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present violation exists.' Id. at 558 (emphasis in original)."Id. at 258. (Footnote omitted; emphasis added.)

Even when a plaintiff sues and challenges the termination rather than the decision to terminate, the 180-day period begins to run when he is notified of the discharge. Thus, in Chardon v. Fernandez, 454 U.S. 6 (1981) rehearing denied, 454 U.S. 1166 (1982), the Court stated:

"In Ricks, we held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act became painful. Id. at 258, 24 FEP Cases at 830. The fact of termination is not itself an illegal act. In Ricks, the alleged illegal act was racial discrimination in the tenure decision. Id. at 259, 24 FEP Cases at 831. Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in Ricks or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. As we noted in Ricks, '[m]ere continuity in employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.' Id. at 257, 24 FEP Cases, at 830. In the cases at bar, respondents were notified, when they received their letters, that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suit must be filed." Id. at 29. (Emphasis added.)

-
4. It is significant that the Court in Ricks explicitly rejected the claim that the pendency of a grievance filed by the plaintiff operated to toll the 180-day period or that the 180-day period did not commence until the grievance was filed. Id. at 262.

Recognizing that the ADEA is modeled after Title VII, courts have applied the Ricks decision to suits brought under the ADEA. For example, in Barnett v. Manpower, supra, Judge Krupansky, then district court judge, granted defendant's Motion for Summary Judgment, stating:

"This Court concludes that Ricks is applicable to the instant litigation. See Anness v. Steelworkers, 26 FEP Cases 1340 (N.D. Ohio 1982). Barnett's deposition, read in the light most favorable to the plaintiff, clearly evidences that Barnett was informed of the decision to terminate him on or before February 7, 1981. Therefore, applying the Ricks holding, this Court finds that Barnett was required by statute to file an administrative notice of his ADEA complaint against Manpower no later than August 7, 1981. The Court finds Barnett failed to file a timely notice and this action is therefore time-barred." Memorandum and Order, p. 4.

See also Pierce v. Green Giant Co., supra; Price v. Litton Business Systems, Inc., 694 F.2d 963 (4th Cir. 1982) (180-day period commenced when employee was informed that he would be relieved of duties as branch manager and not when he left his employment); Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir.), rehearing denied, 656 F.2d 704 (5th Cir. 1981); Coke v. General Adjustment Bureau, Inc., 616 F.2d 785 (5th Cir. 1980); Lippert v. General Electric Co., 28 EPD ¶32,695 (W.D. Ky. 1982); Needham v. Beecham, Inc., 515 F.Supp. 460 (D. Maine 1981) (limitation period begins to run when plaintiff knew of termination; equitable tolling improper where he consulted attorney within 180 days).

Manifestly, the alleged discriminatory actions that are the basis for the instant action did not occur within 180 days of plaintiff's filing of a charge of unlawful discrimination. Plaintiff claims that she was discriminated against on the basis of sex in her salary and on the basis of age in the Board's nonrenewal of her employment. [Amended Complaint ¶¶17, 20, 22]

Yet it is clear from her deposition that as early as 1979, plaintiff knew that salaries of coaches in other positions were greater than hers.

Plaintiff testified:

"Q. Now, when did you become first aware that there was -- that you felt there was sex discrimination going on?

A. Well I guess that -- probably in 1979". [Francis Depo at 122] See also [REDACTED] Depo at p. 60, 97.

Moreover, the last time plaintiff received any pay from the Board was June 5, 1981. [REDACTED] Affidavit, ¶10] Clearly then, under the Supreme Court decisions in Ricks and Chardon, the 180 day filing period began in 1979, or at the latest, June 5, 1981. Since her charge was not filed until December 15, 1981, it is clear that it was not timely filed.

Similarly, plaintiff testified that she first became aware of the alleged age discrimination in the fall of 1980. Specifically, she testified:

"Ms. Maher: My question was, when was the first time she became aware of age discrimination

* * *

A. I guess I was first aware of it during the -- in 1980 when he [Mr. [REDACTED]] called me, and then during the season in 1981." [REDACTED] Depo at 120-21] See also [REDACTED] Depo at p. 118.

Further, plaintiff received notice that her contract was nonrenewed on April 27, 1981. Again, despite the fact she knew of the alleged age discrimination in the fall, 1980, and, at the latest, by April 27, 1981, she delayed filing her charge of discrimination with the EEOC until well beyond 180 days after she first became aware of the alleged age discrimination.

In a case with facts similar to those of this action, EEOC v. Kimberly-Clark Corp., 531 F.Supp. 58 (N.D. Ga. 1981), the court dismissed an action brought under the ADEA because no charge was timely filed. The plaintiff in Kimberly-Clark had been notified in February, 1983, that he would be retired on April 1. The date was then changed to June 30, at which time the plaintiff continued on the payroll on special assignment until September 30. The court held that because the gravamen of the complaint involved his termination, the 180-day period commenced February 12, 1983, when he was notified that he would be terminated, although he was continued on the payroll beyond the February 12, 1983 date. See also, Tobin v. Trans Union Systems Corp., 488 F.Supp. 622 (E.D. Pa. 1980), (court granted partial summary judgment in an ADEA suit on the ground that plaintiff failed to file a timely charge of discrimination. Court held that plaintiff's first suspicions that he was being discriminated against triggered the 180-day limitations period).

So, too, in this case, based on plaintiff's own testimony and the pleadings on file with the Court, it is clear that the Board is entitled to the entry of judgment in its favor as a matter of law. Plaintiff has sued for sex discrimination in salary and age and sex discrimination in her nonrenewal. [Amended Complaint ¶17, 27] Despite the fact plaintiff knew of any salary differences with other coaches in 1979, and received no salary after June 5, 1981, she did not file a charge until December 15, 1981. Similarly, she first learned of alleged age discrimination in the fall of 1980, which was further supported by events occurring in the spring of 1981, yet she again delayed filing a charge.

Consequently plaintiff's failure to file a charge of sex or age discrimination within 180 days of 1979 and the fall of 1980, respective dates the alleged discriminatory action began, or even within 180 days of the date she was last employed, bars both the claims under the ADEA and Title VII in the Complaint, and thus these claims must be dismissed.

C. Plaintiff Cannot Recover for Alleged Sex Discrimination Under Title VII as a Matter of Law.

To prevail in her Title VII suit, plaintiff must establish a prima facie case of unlawful discrimination because of her sex. Further, the ultimate burden of proof remains with her at all times. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Washington v. Davis, 426 U.S. 229 (1976); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

In Texas Department of Community Affairs v. Burdine, supra, the Supreme Court articulated the burden and the order of proof to be applied in disparate treatment cases. The Court stated:

"In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), we set forth the basic allocations of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeded in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' Id. at 803, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804.

"The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 252-53 (emphasis added) (footnote omitted).

Thus, to establish a prima facie case a person "must first establish that her employment terms varied from those which her employee accords to similarly situated male workers." Long v. Ford Motor Company, 496 F.2d 500, 505 (6th Cir. 1974). It is significant that employee must prove causation: Title VII permits recovery only for actions taken because of sex. Consequently, plaintiff must prove that defendant intentionally discriminated against her because of sex. Department of Community Affairs v. Burdine, *supra*.

When a Title VII claimant alleges the denial of equal pay for equal work, equal pay standards apply although the burden of proof is that set forth in Burdine. Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1980) affirmed 452 U.S. 161 (1981).⁵ Plaintiff thus must prove a prima facie case by establishing by a preponderance of the evidence that the defendant paid to her a salary lower than that paid to males for work the performance of which required equal skill, effort and responsibility and which was performed under similar working conditions. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); Marshall v. Dallas Independent School District, 605 F.2d 191, 196 (5th Cir. 1979) reh. denied, 608 F.2d 1373 (4th Cir. 1979). As stated in Corning Glass Works, the employee

5. It is defendant's position that the Burdine decision still allocates the burden of proof in a wage based discrimination claim brought under Title VII. Scott v. Oce Industries, 536 F.Supp. 141 (N.D. Ill. 1982).

In short, it is clear that plaintiff will be unable to prove as a matter of law that she was discriminated against because of her sex. Her salary was not based on her sex but rather on the duties of the position she held. Similarly, she received the same equipment as did the boys' track and field team. Accordingly, plaintiff's claims of sex discrimination should be dismissed.

D. Plaintiff Will Be Unable to Succeed as a Matter of Law on Her Claims of Age Discrimination.

Plaintiff claims that her contract was nonrenewed because of her age. As noted, this claim is untimely and should be dismissed. Even assuming that the claim was timely filed with the EEOC, however, it is clear that she will be unable to succeed as a matter of law on her claim of age discrimination.

The plaintiff bears the ultimate burden of proving that he was discriminated against because of age. Rose v. National Cash Register Corp., 703 F.2d 225, 227 (6th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 352 (1983); Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1180 (6th Cir. 1983); Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975). The plaintiff can only establish a prima facie case of discrimination under the ADEA by presenting evidence which, when viewed in the light most favorable to plaintiff, would permit a reasonable jury to find that plaintiff was discriminated against because of age. Rose v. National Cash Register Corp., 703 F.2d at 227. At the same time, if there is simply no reasonable inference that plaintiff was discriminated against because of age, plaintiff has failed to present a prima facie case, and the lawsuit is at an end. Id.

In the instant case, there is simply no reasonable inference that plaintiff was discriminated against because of age. The action of the Board in nonrenewing plaintiff's contract was required under Ohio law. Pursuant to Ohio Revised Code §3313.53, a board of education which employs a non-certificated individual in a coaching position may do so only for a period not to exceed one year. Further, Ohio law prohibits employing a non-certificated individual if a certificated employee applies for the job. Ohio Revised Code §3313.53.

Regardless, it is clear as a matter of law that the Board did not know plaintiff's age before her employment. [REDACTED Depo. at _____]. Additionally, plaintiff's age does not appear on any of the applications completed by plaintiff for the assistant girls' track coach position in 1978-79, 1979-80 or 1980-81. [REDACTED Depo, Exhibits B, C, D]. In fact, plaintiff admits that in each year she was hired she was within the protected age bracket. [REDACTED Depo at 12, 103] Furthermore, in the last year she was hired, plaintiff was selected over a younger candidate. [Valot Depo. at _____] Manifestly such conduct by the Board summarily refutes plaintiff's allegation of age discrimination.

Moreover, it is clear that plaintiff was not qualified for the position of assistant girls' track coach. She never participated in track, never threw a shot put or discus and never participated in hurdles, high jump, or a relay race. [REDACTED Depo at 117, 118] She never took any coaching courses. [Id. at 14-17] Indeed, her sole qualification is that she was a recreational jogger.

In short, it is clear as a matter of law that plaintiff will be unable to establish a prima facie case of age discrimination or succeed in her claim of age discrimination. Rose v. National Cash Register Corp., supra. Accordingly, summary judgment in favor of defendants should be granted on plaintiff's age discrimination claim.

E. Plaintiff Cannot Recover Under 42 U.S.C. §1983.

In order for a Board employee to state a claim under §1983, the employee must have a property interest in his employment or be deprived of his job because of a constitutionally impermissible reason. Ryan v. Aurora City Board of Education, 540 F.2d 222 (6th Cir. 1976), cert. denied, 429 U.S. 1041 (1977); Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972). In the instant case, plaintiff cannot recover under 42 U.S.C. §1983, because she has no property right to the position of assistant girls' track coach. Additionally, plaintiff fails to state a cognizable claim under §1983, because the Board's reason for refusing to rehire plaintiff was constitutionally permissible.⁷

The United States Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972), stated that to have a property interest in a benefit,

"a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

7. There is also no merit to plaintiff's allegation that the Board has violated her fourteenth amendment equal protection right by treating persons differently on the basis of age. The Board treats all persons alike, regardless of age, as evidenced by the fact that plaintiff herself was selected as the assistant girls' track coach over a younger individual for the 1980-81 school year. (██████ Depo. at _____)

APPENDIX II
Rule 68 - OFFER OF JUDGMENT

Squire, Sanders & Dempsey

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November 6, 1984

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General Counsel, American

[REDACTED]
Standard Building
Cleveland, Ohio 44113

Re: [REDACTED] of Education

Dear Mr. [REDACTED]:

The purpose of this letter is again to set forth a partial offer of judgment in the above-referenced case pursuant to Rule 68 of the Federal Rules of Civil Procedure. This partial offer of judgment is confined solely to the claims arising out of plaintiff's EEOC Charge 052781448, more specifically set forth in Count I (Title VII), paragraphs 24-30 inclusive, and incorporated by reference in Count II (ADEA) and Count III (§1983) of plaintiff's complaint filed April 15, 1984 before the Honorable Judge [REDACTED] in the United States District Court for the Northern District of Ohio, Eastern Division. The terms of the offer are: 1) payment of \$500 to plaintiff in resolution of all of her monetary claims relative to the court claims arising out of her September 1978 charge of discrimination; 2) award of all taxable court costs to plaintiff and against defendant relative to the court claims arising out of her September 1978 charge of discrimination; 3) reasonable attorney's fees for those services reasonably and necessarily performed on the plaintiff's behalf relative to the court claims arising out of her September 1978 charge of discrimination (These fees are to be determined by the court under Title VII standards after completion of the other terms of the offer.); and 4) judgment for the plaintiff and dismissal with prejudice of plaintiff's claims against defendants arising out of the September 1978 EEOC charge, specifically contained in Count I, paragraphs 24-30, and reiterated in the pertinent paragraphs under plaintiff's claims based on ADEA (Count II) and under 42 U.S.C. §1983 (Count III).

If this offer is not accepted within the time provided by the Federal Rules of Civil Procedure and the ultimate result is not more favorable to the plaintiff than this offer, then the defendant Board will seek to enforce its rights to the fullest possible extent including the collection of its attorney's fees as part of the costs awardable under §706(k) of Title VII, 42 U.S.C. §1988, and Rule 68.

Based upon the plaintiff's deposition, answers to interrogatories, documents produced in the course of discovery, and a review of the file, we believe this partial offer to be more than a fair resolution of the complaint allegations arising out of plaintiff's September 1978 EEOC charge involving the alleged discriminatory denial of promotion to the combined position of Principal of [REDACTED] School, Title I Director and Adult Basic Education Director.

During the 1978-79 school year, Mr. [REDACTED] earned \$19,304.60 as Principal of [REDACTED] School, Title I Director and Adult Basic Education Director. If [REDACTED] had held this position during the 1978-79 school year, she would have been paid \$1,500 more than [REDACTED] which would have brought her total earnings to \$20,804.60. Because [REDACTED] actually earned \$22,886.34 during the 1978-79 school year, there is no backpay liability for school year 1978-79.

During the 1979-80 school year, Mr. [REDACTED] earned \$20,296.55 as Principal of [REDACTED] School, Title I Director and Adult Basic Education Director. If Mrs. [REDACTED] had held this position during the 1979-80 school year (and assuming that she had held this position during the 1978-79 school year), she would have earned \$1,173 more than Mr. [REDACTED] which would have brought her total earnings to \$21,469.55. Because Mrs. [REDACTED] actually earned \$21,212.20, the maximum possible backpay liability is \$257.35.

Moreover, we have previously provided evidence, by way of copies of letters, that an unconditional offer of the administrative position of principal of [REDACTED] Elementary School was made to your client for the 1979-80 school year. As such, that offer served to cut off any possible backpay liability for 1979-80. However, we are formalizing an offer of \$500 in the unlikely event that Judge [REDACTED] should subsequently find that the offer of a principal position was not unconditional. Our offer therefore more than fully compensates your client for the 1978 alleged discriminatory denial of promotion.

This is a case where the litigation costs thus far have greatly exceeded any potential backpay liability of defendants relative to a failure to promote plaintiff to an administrative position in 1978. It is an outrageous expense and a waste of judicial time to litigate this issue. A comparison of Mrs. [REDACTED] and Mr. [REDACTED] federal tax forms from the Board of Education clearly reveals that in 1978, 1979 and 1980, Mrs. [REDACTED] earned more than Mr. [REDACTED]. In 1978, Mrs. [REDACTED] earned

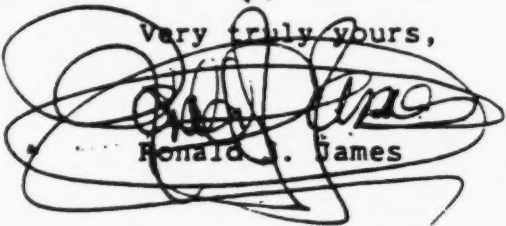
Equire, Sanders & Company

\$26,176.86 while Mr. [REDACTED] earned only \$17,136.30. In 1979, Mrs. [REDACTED] earned \$21,998.87, while Mr. [REDACTED] earned \$20,292.90. And, in 1980, Mrs. [REDACTED] earned \$22,913.14, while Mr. [REDACTED] earned \$22,303.18.

Despite our belief that there is no backpay liability with respect to the 1978 promotion, we are making this partial offer of judgment in the generous amount of \$500, because we would like to end this senseless expenditure of legal fees. You can be certain that we are keeping careful track of the time spent on this case, because if our offer is not accepted, and the ultimate result is not more favorable to Mrs. [REDACTED] than this offer, we will seek collection of attorneys' fees.

We await your response.

Very truly yours,


Ronald J. James

RJJ:dee

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THERES [REDACTED],
Plaintiff,

v.

[REDACTED] BOARD OF EDUCATION,
et al.,
Defendants.

) CASE NO. C82-[REDACTED]
)
)
) Judge White
)
)
)
)
)
)
)

PARTIAL OFFER OF JUDGMENT

TO: [REDACTED] Building
Cleveland, Ohio 44113

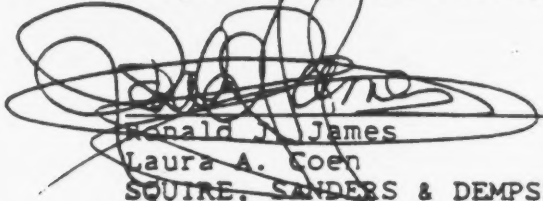
Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant [REDACTED] Board of Education hereby offers to allow judgment to be taken against it by the plaintiff in this action relative to paragraphs 24-30 of Count I and incorporated by reference in Counts II and III arising out of plaintiff's September 1978 charge of discrimination, said judgment to include: 1) a money judgment in the amount of \$500.00 (Five Hundred Dollars) relative to paragraphs 24-30 of Count I and incorporated by reference in Counts II and III arising out of plaintiff's September 1978 charge of discrimination; 2) taxable

court costs accrued to this date to be determined by the court relative to paragraphs 24-30 of Count I and incorporated by reference in Counts II and III arising out of plaintiff's September 1978 charge of discrimination; 3) reasonable attorney fees for those services reasonably and necessarily performed on the plaintiff's behalf relative to paragraphs 24-30 of Count I and incorporated by reference in Counts II and III arising out of plaintiff's September 1978 charge of discrimination; and 4) judgment for the plaintiff and dismissal with prejudice of plaintiff's claims against defendants relative to paragraphs 24-30 of Count I and incorporated by reference in Counts II and III arising out of plaintiff's September 1978 charge of discrimination.

-Evidence of this offer is not admissible except in a proceeding to determine costs. This Partial Offer of Judgment is made solely for the purposes specified in Rule 68 and is not to be construed either as an admission that defendant [REDACTED] Board of Education is liable in this action or that plaintiff and/or any female and/or older (40-70) employee of defendant has

suffered any damage. If this Offer is not accepted in writing within ten (10) days after it is served, it shall be deemed withdrawn.

Respectfully submitted,



Ronald A. James

Laura A. Coen
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorney for Defendant
[REDACTED] Board of Education

OFFER OF JUDGMENT TO EEOC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

F.R.C.P.
68 E

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

[REDACTED],

Defendant.

CIVIL ACTION NO. 81 [REDACTED]

JUDGE [REDACTED]

OFFER OF JUDGMENT

TO: [REDACTED], Esq.
Equal Employment Opportunity Commission
55 East Jackson Boulevard, Room 1401
Chicago, Illinois 60604

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it by the plaintiff in this action, said judgment to include: 1) a Consent Decree in the form attached hereto; 2) a money judgment in the amount of \$20,001.00 (Twenty Thousand and One Dollars) together with reasonable court costs accrued to this date to be determined by the Court; and 3) an agreement by defendant to take specified affirmative action with regard to the promotion of female employees to management positions.

Evidence of this offer is not admissible except in a proceeding to determine costs. This Offer of Judgment is made solely for the purposes specified in Rule 68 and is not to be construed either as an admission that defendant is liable in this action or that any female employee of defendant has suffered any damage. If this Offer is not accepted in writing within ten (10) days after it is served, it shall be deemed withdrawn.

Respectfully submitted,



Ronald J. Jones
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 687-8500

OF COUNSEL:

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(312) 630-4200

Attorneys for Defendant

APPENDIX III

MOTION IN LIMINE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[REDACTED]	)	CASE NO. C82-[REDACTED]
	)	
Plaintiff,	)	JUDGE [REDACTED]
	)	
v.	)	
	)	
[REDACTED] BOARD OF EDUCATION,	)	DEFENDANT [REDACTED] BOARD OF
<u>et al.</u> ,	)	<u>EDUCATION'S MOTION IN LIMINE</u>
	)	
Defendants.	)	

Defendant [REDACTED] Board of Education ("Board") respectfully moves this Court for an order in limine to exclude at trial any evidence of employment decisions by defendant Board other than those directly raised by plaintiff in her complaint and also any evidence or testimony regarding events in the [REDACTED] School System or the City of [REDACTED] which are unrelated to the 1978 and 1980 promotion decisions at issue in this case. Such evidence is irrelevant to plaintiff's claims and its probative value, if any, is substantially outweighed by the dangers of unfair prejudice, confusion of the issues and misleading the jury.

The reasons and authority supporting this motion are more fully set forth in the attached Brief in Support of Defendant's Motion in Limine, incorporated herein by reference.

Respectfully submitted,

Ronald J. James
Laura A. Coen
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Defendant
[REDACTED] Board of Education

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[REDACTED]	)	CASE NO. C82-[REDACTED]
	)	
Plaintiff,	)	JUDGE [REDACTED]
	)	
v.	)	
	)	
[REDACTED] BOARD OF EDUCATION,	)	BRIEF IN SUPPORT OF DEFENDANT
<u>et al.</u> ,	)	<u>BOARD'S MOTION IN LIMINE</u>
	)	
Defendants.	)	

I. PRELIMINARY STATEMENT

In her complaint, plaintiff alleges that she was denied two separate promotions by defendant Board in 1978 and 1980. Plaintiff has indicated that she will attempt to introduce evidence of past employment decisions made by different boards and different superintendents going back to 1972 as well as extraneous evidence of events in the [REDACTED] City School District and the City of [REDACTED] which are wholly unrelated to the Board's 1978 and 1980 promotion decisions.

Such incidents are irrelevant to plaintiff's claims of discrimination in 1978 and 1980 and further present substantial

danger of unfair prejudice to defendant Board, confusion of the issues and misleading of the jury. Even if this Court finds that this evidence has some minimal probative value, its permissible temporal scope should be limited to a period beginning five years before the filing of the complaint in this case.

II. ARGUMENT

A. Evidence Of Employment Decisions And Other Events Not Involving Plaintiff Is Irrelevant And Should Be Excluded At Trial.

Plaintiff's complaint alleges that she was discriminated against on the basis of sex when she was not promoted in 1978 and on the basis of sex and age when she was not promoted in 1980. These allegations constitute a claim of individual disparate treatment, and do not allege class-based discrimination or disparate impact upon a protected class.

Plaintiff proposes to introduce evidence of alleged discriminatory incidents unrelated to the 1978 and 1980 promotion decisions. Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401.

In a disparate treatment case, the plaintiff must prove that the employer discriminated against him or her individually.

Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981); Scarlett v. Seaboard Coast Line Railroad Co., 676 F.2d 1043 (5th Cir. 1982); Goff v. Continental Oil Co., 678 F.2d 593, 596 (5th Cir. 1982). Testimony by or about other employees is irrelevant to the question of whether plaintiff was discriminated against in the two discrete instances at issue in this case and cannot be used to prove plaintiff's prima facie case. Hudson v. International Business Machines Corp., 620 F.2d 351 (2nd Cir. 1980) cert. den., 449 U.S. 1066 (1980). See also Martin v. Citibank, 762 F.2d 212, 218 (2nd Cir. 1985).

In Goff v. Continental Oil Company, 678 F.2d 593 (5th Cir. 1982), the Fifth Circuit Court of Appeals held that evidence of discrimination against three employees who were not parties to the action was inadmissible, stating:

Goff's claim was one of individualized, as opposed to classwide, discrimination. To prevail he had to show that Conoco purposefully discriminated against him. The witnesses Goff wanted to call could not testify as to Conoco's motive, intent or purposefulness in failing to promote Goff. ... Because this testimony would not have related to the issue of whether Goff suffered discrimination, the court did not err in refusing to admit this testimony. 678 F.2d at 596-97. (emphasis in original)

Similarly, the issue in the present case is whether plaintiff was discriminated against and evidence of employment decisions made under different circumstances, by different boards and superintendents, involving different employees as well as

evidence of events unrelated to the promotional process is irrelevant and should be excluded.

B. Evidence Regarding Other Employment Decisions And Events Must Be Excluded Because It Will Result In Unfair Prejudice To Defendant Board, Confusion Of The Issues And Misleading Of The Jury.

Federal Rule of Evidence 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Even if the evidence that plaintiff proposes to introduce were relevant in some way to the issues in this case, it should nevertheless be excluded under Rule 403. Any tenuous and speculative value this evidence may have is outweighed by the fact that it would result in substantial unfair prejudice to defendant Board, confuse the jury and mislead them into believing that this trial concerns persons other than plaintiff and events other than the 1978 and 1980 promotions.

By introducing evidence about other employment decisions and events unrelated to the promotions at issue, plaintiff seeks to try her case "by example." By offering evidence of events that occurred under widely divergent circumstances, plaintiff

hopes to mislead the jury into believing that the Board is on trial for those events as well, resulting in unfair prejudice to defendant Board. In Haskell v. Kaman Corp., 743 F.2d 113 (2nd Cir. 1984), the Second Circuit held that evidence of age-related remarks made by the company president and testimony by six former officers was wrongfully admitted in an age discrimination case on the grounds that such anecdotal evidence is irrelevant and prejudicial. 743 F.2d at 120-121. See also Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 (1974).

Further, admission of "example" evidence will confuse the issues and result in undue delay. To rebut the inference the plaintiff hopes the jury will draw from its speculative evidence, the Board would be forced to offer evidence as to the circumstances in each of those events. The result would be a series of trials within the trial, needlessly prolonging the trial and misleading the jury. Moorhouse v. Boeing Co., 501 F.Supp. 390 (E.D. Pa. 1980), aff'd mem., 639 F.2d 774 (3rd Cir. 1980).

- C. Even If The Court Finds That Plaintiff's Proposed Evidence Has Some Minimal Relevance To The Issues In This Case, The Temporal Scope Of Such Evidence Should Be Limited To Five Years Prior To The Filing Of The Complaint.

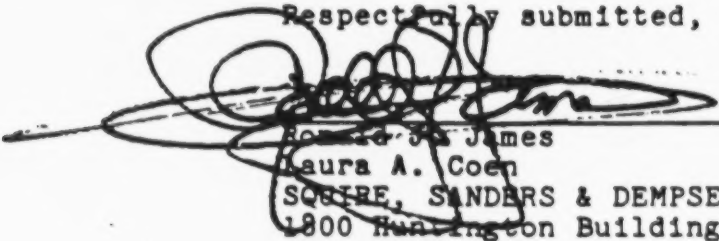
Even if the Court finds that evidence of employment decisions and events wholly unrelated to the promotions at issue is somehow relevant to the determination of plaintiff's claim, the admission of such evidence should be limited to the period beginning five years prior to the filing of plaintiff's complaint on April 15, 1982. Davis v. Burlington Industries, 30 E.P.D. ¶33,312 (N.D. Ga. 1983) (scope of information admissible in Equal Pay Act case limited to five years prior to filing of complaint). The relationship between events occurring prior to this time and the 1978 and 1980 promotion decisions is so attenuated as to lack any relevance at all to the question of whether plaintiff was discriminated against in 1978 and 1980. See also Williams v. United Parcel Service, 30 E.P.D. ¶33,145 (N.D. Ohio 1982) (even under liberal discovery standard, discovery requests denied which requested information covering a period more than one year prior to first alleged discriminatory practice because relevance not established).

III. CONCLUSION

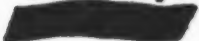
Evidence concerning employment decisions and events wholly unrelated to plaintiff and the 1978 and 1980 promotion decisions at issue in this case are irrelevant to plaintiff's claim and will result in unfair prejudice to defendant Board, confusion of the issues and misleading of the jury. For these reasons, defendant respectfully requests this Court to enter an

order in limine excluding any such evidence. If the Court finds that such evidence has some minimal relevance that is not substantially outweighed by the obvious dangers of unfair prejudice and confusion, defendant respectfully requests that such evidence be limited to the period beginning five years before the filing of plaintiff's complaint in 1982.

Respectfully submitted,



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1800 Huntington Building
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Attorneys for Defendant
 Board of Education

15 Rules for a Good Witness

1. Tell the truth.

2. Discuss your testimony in advance. If you are called as a witness in a case, the lawyer calling you will undoubtedly discuss the case with you before the trial. There is nothing improper in this. It is the lawyer's job to find out in advance what you know about the case. He or she can explain courtroom procedure to you, and you should not hesitate to ask about proper courtroom behavior. If asked while testifying, do not hesitate to state that you have discussed the case with the attorney who called you as a witness.

3. Take your time. When you testify you may be nervous, as most witnesses are. Do not answer questions hurriedly without giving them proper consideration or without understanding them fully.

4. Be attentive. You must be alert at all times while you are in the witness chair, so that you can hear, understand and give a proper and intelligent answer to each question. If the judge or jury gets the impression you are indifferent they may not give much weight to your story.

5. Think before you speak. Hasty and thoughtless answers may be incorrect and cause trouble. This is particularly true when you are being cross-examined. The

PREPARING TO BE A WITNESS AT TRIAL

Our American system of justice requires court trials to decide the rights and obligations of people. Most trials are decided on facts stated by witnesses who have been sworn on their oath to tell about things they have seen and heard. The role of a witness is extremely important in our system of justice.

Someday you may be called upon to be a witness, to tell in court certain facts which you know. If you are summoned, you cannot refuse. If you are not summoned but are asked by one of the parties, do not refuse. It is our duty as citizens to give our testimony if it is needed. It may not be convenient to leave your job or home to spend a day in court, but remember some day you may be in court and find the fate of your case based on the willingness of someone to come forward as a witness.

Many people feel that if they testify one of the lawyers might try to make them look foolish or "tear them to pieces." This would only happen when a witness does not understand what he is expected to do and how he is expected to do it. You can avoid this by reading and following these simple rules:

opposing lawyer may ask you leading questions -- questions which suggest only one answer. Make sure you understand the question; then give an accurate answer.

6. Speak clearly. It is very annoying to a court, jury and lawyers to have a witness who does not speak loudly enough to be heard. A low tone of voice not only detracts from the value of your testimony, but also tends to make the court and jury think that you are not certain of what you are saying. Everyone in the courtroom is entitled to know what you have to say. There are no secrets in court; the court reporter must be able to hear all of your testimony to make an accurate record of the case.

7. If you do not understand a question, ask that it be explained. Many times a witness will not understand a question that has been asked, but will go ahead and try to answer it anyway. This is confusing to the court, the jury and the lawyers. It also extends the time a witness will be on the witness stand because the lawyers must go back and correct any misinformation given by a witness who did not understand a question. If you do not understand, feel free to say so and ask that the question be explained to you.

8. Answer all questions directly. Too often witnesses will be so anxious to tell their story that they will want to get it all told in answer to the first question.

Listen to the question. If you can answer it with a "yes" or "no," do so. Information which you volunteer may have no bearing on the case and may serve only to delay the proceedings.

9. Stick to the facts. The only thing that you will be permitted to testify to is what you personally know. Information given to you by someone else is almost never admissible in the case. What you KNOW is important; why you THINK is unimportant. If you do not know or cannot remember the answer to a question, don't be afraid to say so.

10. Never lose your temper. If witnesses becomes so prejudiced in favor of one side that they lose their temper when facts that are not favorable to their friend are brought out, they place themselves at the mercy of the cross-examiner and make themselves worthless to the side they try to favor. Judges and juries are not interested in prejudiced testimony; they are interested only in facts.

11. Be fair. Though you may be testifying for a friend and would like to see him or her win, do not color your testimony or try to overdo it. You will do your friend the best service by making your testimony as objective as possible. If you are involved in a lawsuit some day, you will want to be treated fairly by the witnesses.

12. Don't argue with the attorneys or the judge.

13. Be helpful, not funny. A trial is an important and serious matter to the parties involved. Their money and property may be saved or lost by your testimony. Do not try to be a wit or exchange sallies with the lawyers.

14. Do not worry about the rules of evidence. Rules of evidence control courtroom proceedings. They are designed to eliminate testimony and other evidence which lack certain basic elements of trustworthiness. The judge's ruling on an objection to testimony should not be considered as indicating in any manner the judge's feelings about the witness who is testifying or the merits of the case. Let the judges and the lawyers worry about the rules of evidence.

15. Dress sensibly. Your attire should be comfortable, and appropriate for a courtroom. If you are in doubt about what to wear, ask your attorney.

Depositions

Sometimes you may be notified that an attorney wishes to take your "deposition" in connection with a legal matter. A deposition is testimony that is given outside of the courtroom. Attorneys for both sides will meet with you; a court reporter will also be present. You will be sworn in, just as you are in a courtroom, and everything you say will

be under oath. Attorneys use depositions to help them determine what potential witnesses know about a particular matter.

In many instances, your deposition will be taken and you will later be called as a witness in that case. Both sides will have a copy of the testimony you give in your deposition. If you change your story when later called as a witness, you will lose your credibility as a witness. That is why it is important to remember that when your deposition is taken, it is just like being before a judge in a court of law. It is permissible to review your testimony with the lawyer prior to taking the witness stand.

If you lie while giving a deposition, you are subject to prosecution for perjury just as you are if you lie while under oath on the witness stand.

There may also be a situation when an attorney takes your deposition, but you are not called as a witness. This may happen for a variety of reasons and should not be of concern to you.

19MSVSE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED]

Plaintiff

VS.

[REDACTED] SCHOOL
DISTRICT, ET AL.,

Defendants

\$
\$
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CIVIL ACTION NUMBER [REDACTED]

PROPOSED JOINT PRETRIAL ORDER

APPEARANCE OF COUNSEL

For Plaintiff, [REDACTED], counsel are CLARKE
GABLE WARD, 3400 Montrose Blvd., Suite 301, Houston, Texas
77006, telephone 713/224-4848, and JO ANN GERHARDT, 723 Main
Street, Houston, Texas 77002, telephone 713/224-4785.

For Defendants are the [REDACTED] SCHOOL
DISTRICT, [REDACTED], [REDACTED] E, and [REDACTED].
Their attorneys are KELLY FRELS and JEFFREY J. HORNER of the
law firm of BRACEWELL and PATTERSON, 2900 South Tower,
Pennzoil Place, Houston, Texas 77002, telephone
713/113-2900.

I.

NATURE OF THE CASE

This is a sex discrimination in employment action filed

pursuant to the 42 USCA 2000(e), et seq.. This case is brought by a former employee of Defendants who contends that she was sexually harassed in her employment and that her failure to be receptive to sexual suggestions of her male supervisors and co-employees resulted in her constructive discharge.

The Plaintiff, [REDACTED], was formerly employed as a Field Safety Representative in the Accident Prevention and Loss Control Department with the [REDACTED]. The administrative superiors of the Plaintiff recommended that [REDACTED] be terminated from her employment at the [REDACTED], effective November 12, 1980. In response to this recommendation, Ms. [REDACTED] submitted her resignation to the [REDACTED] on October 30, 1980. After her resignation, the Plaintiff filed a charge of racial and sexual discrimination against the HISD with the Equal Employment Opportunity Commission (EEOC). The EEOC determined that there was no reasonable cause to believe that Ms. [REDACTED] allegations of sexual and racial discrimination were true. The EEOC issued Ms. [REDACTED] a right to sue letter on February 14, 1983. Shortly thereafter, the Plaintiff filed this lawsuit.

The Plaintiff contends that she was subject to discrimination at the [REDACTED] on the basis of her race (black) and her gender (woman). The Defendants contend that the

Plaintiff was terminated due to unsatisfactory job performance. Her job as a Field Safety Representative involved the compilation of data, the writing of technical reports, the presentation of inservices to [REDACTED] employees, and other duties. The employee's work performance in these areas was consistently below the standards expected of Field Safety Representatives within the [REDACTED]. The Plaintiff was informed of her deficiencies on numerous occasions. Specifically, she was informed on her work deficiencies in separate memoranda dated August 15, September 18 and October 22 of 1980. The memoranda indicated that she was not using her work day efficiently, that she had a hostile attitude toward her superior officers, and that her professional development was progressing in an inordinately slow fashion. The Plaintiff was given nearly two and a half months from her first evaluation to correct these deficiencies. She was not able to make the necessary improvements. As a result, her administrative superiors were left with no choice but to recommend that she be terminated from her employment within the [REDACTED].

The Plaintiff contends that the Defendants' discriminatory practices deprived her of her rights guaranteed to her through the United States Constitution and numerous federal statutes. The Plaintiff initially seeks

recovery under 42 U.S.C. § 1983. The Defendants deny that the Plaintiff was discriminated against in any aspect of her employment because of her race or gender. The Defendants did not and do not maintain a policy or custom of discriminating against its black or female employees in either its Accident Prevention and Loss Control Department or any of its other departments. Furthermore, the Defendants did not purposefully and intentionally discriminate against the Plaintiff on the basis of her race or gender. She was terminated because her job performance as a Field Safety Representative was substandard.

The Plaintiff has also brought this action under 42 U.S.C. § 2000e, et seq (Title VII), alleging discrimination on the basis of her race and gender. The Plaintiff maintains that it is a common policy of officials at the [REDACTED] to require their female employees to submit to the sexual advances of male employees to become eligible for hiring or promotion. The Defendants assert that the Plaintiff's allegations are unfounded. The Defendants maintain, as stated earlier, that the Plaintiff was terminated for legitimate, non-discriminatory reasons, i.e., inadequate work performance. The Defendants did not purposefully or intentionally discriminate against the Plaintiff on the basis of her race or gender.

Finally, the Plaintiff has brought this action under 42 U.S.C. § 1985. She alleges that a conspiracy existed to deprive the Plaintiff of her constitutional rights. The Defendants maintain that no such conspiracy existed. In addition, 42 U.S.C. § 1985 requires that "two or more persons" must conspire together to deprive a person of his or her constitutional rights. In her Complaint, the Plaintiff maintains that only a single entity (or "person" within the meaning of 42 U.S.C. § 1985), the HISD, is allegedly involved in a conspiracy. She has not alleged that another person or entity within the meaning of 42 U.S.C. § 1985 has conspired with the [REDACTED] to discriminate against her. Accordingly, she fails to state a claim under 42 U.S.C. § 1985.

II.

JURISDICTION

The Plaintiff contends that this Court has proper jurisdiction over this case under 28 U.S.C. § 1343(3) and (4), 42 U.S.C. §§1983 and 1985, and 42 U.S.C. § 2000(e) et seq.

The Defendants deny that this Court has jurisdiction over the Plaintiff's Title VII claim for numerous reasons. First, the Plaintiff did not receive a right to sue letter from the United States Department of Justice before bringing this suit, a jurisdictional prerequisite to the assertion of

a Title VII claim. Secondly, this action is barred with respect to [REDACTED], [REDACTED] and [REDACTED] (collectively the Individual Defendants) because these individuals were not named as respondents in the EEOC charge filed by the Plaintiff. This Court may not entertain jurisdiction in a Title VII action over the person of any individual who was not named as a respondent in an EEOC charge. Finally, the Individual Defendants are not "employers" within the meaning of Title VII and are not amenable to suit under the statute. The Defendants also deny there is any constitutionally protected right involved, thus precluding this Court from entertaining jurisdiction over the Plaintiff's 42 U.S.C. § 1983 claim. In addition, the Plaintiff has wholly failed to allege that a conspiracy existed between "two or more persons" to deprive her of any constitutional rights, thus precluding this Court from entertaining jurisdiction over the Plaintiff's 42 U.S.C. § 1985 claim.

The Defendants also deny that venue is properly vested in this Court, because the Plaintiff failed to allege proper venue in her Complaint.

III.

MOTIONS

The Defendants' Motion for Partial Summary Judgment is pending.

IV.

CONTENTIONS OF THE PARTIES

A. Plaintiff's Contentions

Plaintiff was employed for Defendant, HOUSTON INDEPENDENT SCHOOL DISTRICT, in September 1, 1978 to October 30, 1980 as a Field Safety Representative. She was previously duly licensed as a claims adjuster by the Texas Board of Insurance. Such license was required for her employment with Defendant.

Plaintiff contends that shortly after her employment she was subjected to the solicitous sexual advances of the named individual Defendants and unnamed employees of the Defendant [REDACTED] including its Deputy superintendent.

Plaintiff resisted these advances but she was repeatedly told by her female co-workers that "they are interested in you."

Shortly thereafter, Plaintiff was subjected to the "Fire and Ice" treatment. That is, on a given day she would be given a memo critical of her performance but a few days later a statement commending her would be issued.

Plaintiff contends that if she had been more receptive and cooperative with sexual advances of Defendants and male employees no adverse action would have been taken against her.

B. Contentions of the Defendant [REDACTED]

The [REDACTED] denies that there are any constitutionally protected rights involved of which the Plaintiff was deprived. The Defendant also contends that the proposed termination of the Plaintiff did not involve the actions of school employees taken pursuant to an officially promulgated policy or a well-established custom of discrimination on the basis of race and/or gender of which the Board of Education of the [REDACTED] (Board), as the governing body, had knowledge and to which the Board acceded. Furthermore, the actions of the Defendants were not sufficiently "egregious" to implicate any alleged constitutional right of the Plaintiff. Most importantly, the [REDACTED] did not purposefully or intentionally discriminate against the Plaintiff on the basis of her race or gender. Rather, she was terminated for a legitimate, non-discriminatory reason, i.e., substandard work performance, precluding recovery under 42 U.S.C. § 1983.

Furthermore, the Defendants assert that the Plaintiff cannot prove the purposeful discrimination necessary for

recovery under Title VII. The [REDACTED] did not intentionally or purposefully discriminate against the Plaintiff on the basis of her race or gender. She was terminated for a legitimate, non-discriminatory reason. This reason was not merely a pretext for unlawful discrimination. It was the sole reason for her recommendation of termination. As such, the [REDACTED] is not liable under Title VII.

Finally, the [REDACTED] is not liable under 42 U.S.C. § 1985. This statute clearly requires that recovery be based upon a showing that "two or more persons" conspired to deprive a plaintiff of his or her constitutional rights. The courts have interpreted this requirement to mean two or more separate and distinct entities, such as school districts, must conspire to deprive a plaintiff of his or her constitutional rights, not simply two or more agents within one particular entity. The Plaintiff has failed to allege in her Complaint any entity other than the [REDACTED] which allegedly conspired to deprive her of any constitutional rights. As such, the Defendant [REDACTED] is not liable under 42 U.S.C. § 1985.

C. Contentions of the Defendants [REDACTED]
and [REDACTED]

The relevant contentions of the Defendant [REDACTED] are adopted by the Individual Defendants as if fully stated

herein.

The Individual Defendants are entitled to official immunity from liability under 42 U.S.C. § 1983. First, they are not liable in their official capacities. They did not act pursuant to an officially promulgated policy or well-established custom of the [REDACTED] of which the Board, as governing body, had knowledge and to which the Board acceded, which deprived the Plaintiff of her constitutional rights. Furthermore, the Individual Defendants are immune from liability in their individual capacities. At the time of the incident in question, they did not violate any clearly established constitutional rights of the Plaintiff of which a reasonable person should have known. In addition, the Individual Defendants did not purposefully and intentionally discriminate against the Plaintiff in recommending her termination. As such, the Individual Defendants are entitled to good faith immunity and are not liable under 42 U.S.C. § 1983 in both their individual and official capacities.

The Individual Defendants are also not liable to the Plaintiff under Title VII. First, the Individual Defendants are not "employers" within the meaning of Title VII. Secondly, the Individual Defendants were not named as respondents in the EEOC charge brought by the Plaintiff,

precluding this Court from entertaining jurisdiction over a Title VII claim against them. Finally, and foremost, the Individual Defendants are not subject to Title VII liability because they did not purposefully and intentionally discriminate against the Plaintiff.

Finally, the Individual Defendants are not liable to the Plaintiff under 42 U.S.C. § 1985. To recover under the statute, a plaintiff must prove that a conspiracy between "two or more persons" existed which deprived a person of his or her constitutional rights. The courts have determined that an alleged conspiracy between two or more agents of a single entity, such as a school district, is not sufficient to invoke liability under the statute. A conspiracy must exist between agents and officials of two or more separate and distinct entities. The Plaintiff has wholly failed to allege that the Individual Defendants have conspired with officials of another separate and distinct entity to deprive the Plaintiff of her constitutional rights. Thus, the Individual Defendants are not liable under 42 U.S.C. § 1985.

V.

ADMISSIONS OF FACT

Plaintiff admits the following facts:

1. The identity of the parties;

2. The Plaintiff was employed by Defendant from September 1, 1978 to October 30, 1980;
3. Plaintiff resigned after she was recommended for termination;
4. At the time of resignation, Plaintiff's annual salary was \$15,000.00 and
5. Plaintiff filed her charge of discrimination with the Equal Employment Opportunity Commission on April 8, 1981, and more than sixty (60) days expired before the filing of this action in the appropriate Federal Court.

Defendants admit nothing except the identity of the parties.

VI.

CONTESTED ISSUES OF FACT

1. Whether Plaintiff was sexually harassed by Defendants.
2. Whether Plaintiff's decision to resign was voluntary.
3. Whether Plaintiff has exercised reasonable diligence to mitigate any damages which she might have incurred.

4. Whether any of the acts complained of were based upon factors other than the Plaintiff's sex, female.
5. Whether the Defendants maintained an officially-promulgated policy or well-established custom of discriminating against persons on the basis of their race or gender in its Accident Prevention and Loss Control Department of which the [REDACTED] Board of Education had knowledge and acceded to its continuation which was the proximate cause of the Plaintiff's proposed termination and subsequent resignation.
6. Whether the Plaintiff was subject to disparate treatment from that accorded similarly situated individuals within the Accident Prevention and Loss Control Department of the [REDACTED] because of her race or gender.
7. Whether the Defendants purposefully and intentionally discriminated against the Plaintiff on the basis of her race or gender.
8. Whether such discrimination on the basis of race or gender proximately caused the recommendation for the Plaintiff's termination.

9. Whether the Defendants terminated the Plaintiff because of deficiencies in her work performance.
10. Whether the Defendants had a policy, practice, custom or usage of discharging or denying promotions to female employees based upon their refusal to react favorably to the sexual advances of certain [REDACTED] upper level male employees.
11. Whether the Plaintiff obtained a right to sue letter from the United States Department of Justice before asserting her Title VII claim.
12. Whether the Individual Defendants were named as respondents in the Plaintiff's EEOC charge.
13. Whether officials from the [REDACTED] conspired with officials from a separate and distinct entity to deprive the Plaintiff of her constitutional rights.

VII.

AGREED APPLICABLE PROPOSITIONS OF LAW

There are no agreed applicable propositions of law.

VIII.

CONTESTED ISSUES OF LAW

1. Whether Plaintiff can make out a prima facie case of sexual discrimination.

2. Whether any of the acts complained of, if proved, constitute a violation of Title VII.

3. Whether any of Plaintiff's allegations are barred by applicable limitation periods or the equitable doctrine of laches.

4. Whether any of Plaintiff's claims have previously been compromised or settled by her resignation.

5. Whether the [REDACTED] is liable under 42 U.S.C. § 1983.

6. Whether the [REDACTED] is liable under 42 U.S.C. § 1985.

7. Where the [REDACTED] is liable under Title VII.

8. Whether the [REDACTED] maintained an officially promulgated policy or well-established custom of discriminating against its employees in its Accident Prevention and Loss Control Department on the basis of their race or gender of which the Board had actual or constructive knowledge and acceded to its continuation which proximately caused the deprivation of the Plaintiff's constitutional rights.

9. Whether the Plaintiff had any constitutionally protected right of which she was deprived by the actions of the Defendants.

10. Whether the Defendants' actions were sufficiently "egregious" to implicate any constitutional rights of the Plaintiff.

11. Whether the Defendants purposefully and intentionally discriminated against the Plaintiff on the basis of her race or gender.

12. Whether the Plaintiff was victimized by disparate treatment in the Accident Prevention and Loss Control Department of the [REDACTED] on the basis of her race or gender.

13. Whether [REDACTED] and [REDACTED] are "employers" within the meaning of Title VII.

14. Whether [REDACTED] [REDACTED] and [REDACTED] acted in good faith and not in violation of any clearly established constitutional rights of the Plaintiff.

15. Whether the Defendants conspired with agents or officials from a separate and distinct entity to deprive the Plaintiff of her constitutional rights.

16. Whether two or more agents of the [REDACTED] can, under 42 U.S.C. § 1985, conspire among themselves to deprive the Plaintiff of her constitutional rights.

17. Whether the Plaintiff has prevailed on sufficient issues in this cause to be considered a "prevailing party" regarding the right to recover attorneys' fees and court costs under 42 U.S.C. § 1988.

18. Whether the Defendants are entitled to costs, including attorneys' fees, under 42 U.S.C. § 1988.

19. Whether Plaintiff's resignation constituted constructive discharge.

The Defendants have attached their Memorandum in Support of their Contested Issues of Law and Proposed Findings of Fact and Conclusions of Law and would ask for the Court's consideration of this memorandum.

IX.

EXHIBITS

Attached and appropriately marked are two (2) copies of the Defendants' Revised Exhibit List. For the Plaintiff's Exhibit List, see attached document.

WITNESSES

The Plaintiff will call the following witnesses:

1. The Plaintiff, Ms. [REDACTED]
2. Mr. [REDACTED]
3. Mr. [REDACTED]
4. Mr. [REDACTED]
5. Mr. [REDACTED]
6. Ms. [REDACTED]
7. Ms. [REDACTED]
8. Ms. [REDACTED]
9. Ms. [REDACTED]

Attached hereto and appropriately marked are four (4) copies of the Defendants' Revised Witness List. This List

shows the witnesses who may or shall be called by the Defendants.

In the event there are other witnesses to be called at trial, their names and the subject matter of their testimony will be reported to the Court and opposing counsel as soon as possible. This restriction shall not apply to rebuttal or impeaching witnesses, the necessity of whose testimony cannot be reasonably anticipated before the time of trial.

XI.

SETTLEMENT

Settlement offers have been exhausted, and the case will have to be tried.

XII.

TRIAL

There are several witnesses, however, this matter can be tried in one and a half to two (1-1/2 - 2) days. The parties respectfully request as much notice as may be possible or a date certain for trial to accommodate their witnesses.

XIII.

ATTACHMENTS

Attached is a copy of the Defendants' Proposed Findings of Fact and Conclusions of Law, along with the Memorandum in Support Thereof.

APPROVED this _____ day of _____, 19____.

UNITED STATES DISTRICT JUDGE

APPROVAL RECOMMENDED:

CLARKE GABLE WARD
3400 Montrose Blvd., Suite 301
Houston, Texas 77006
713/224-4848

JO ANN GERHARDT
723 Main Street
Houston, Texas 77002
713/224-4785

ATTORNEYS FOR PLAINTIFF

KELLY FRELS
Bracewell and Patterson
2900 Pennzoil Place
711 Louisiana
Houston, Texas 77002
713/223-2900

ATTORNEY FOR DEFENDANTS

38JJHSG

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED],
ET AL.

VS.

[REDACTED] ET AL.

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C.A. NO. [REDACTED]

DEFENDANTS [REDACTED] SCHOOL
DISTRICT, DR. [REDACTED] AND MS. [REDACTED]
MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants, the [REDACTED] School District
([REDACTED]), Dr. [REDACTED] ([REDACTED]) and Ms. [REDACTED]
([REDACTED]), prior to the commencement of trial, file and
present this their Motion in Limine, moving this Court to
enter an Order directing the Plaintiffs, their attorneys and
witnesses to desist and refrain from mentioning or injecting
into the case before the jury, by way of interrogating the
jury on voir dire examination, reading the pleadings,
questioning, objecting, stating during the trial, replying
to objections, arguing to the Court, arguing to the jury, or
in side-bar remarks of counsel, without first taking it up
with the Court, any of the following matters:

1. Any testimony by Plaintiff [REDACTED] on the grounds that he is an incompetent witness.
2. Any testimony related to damages allegedly incurred by Plaintiffs [REDACTED], Sr. and Mrs. [REDACTED] individually because they have stated no individual cause of action for which their personal damages may be granted.
3. Any reference to the testimony of Mr. [REDACTED] before any committee of the Texas Legislature requesting an increase in penalty for perpetrators of assaults at schools because it is irrelevant and prejudicial and would only serve to confuse the jury.
4. Any testimony regarding any teacher or teacher's aide at [REDACTED] Elementary School who was accused of injuring a child by the use of physical force and/or restraint.
5. Any testimony or evidence regarding any offers to settle or compromise this action or any other disputes.

WHEREFORE, PREMISES CONSIDERED, [REDACTED] [REDACTED] and [REDACTED] pray that this Motion be granted and that counsel for Plaintiffs be instructed and through such counsel the parties and witnesses on the Plaintiffs' side of the case be

instructed not to mention or any way place before the jury or the jury panel and inject into the lawsuit the matters here and above discussed, which matters would be highly prejudicial to the rights of [REDACTED] and [REDACTED] without first approaching the bench and obtaining a ruling upon any possible theory of admissibility in connection therewith.

Respectfully submitted,

Bracewell & Patterson

By Janet Little Horton
Janet Little Horton *signed by permission Lisa Gerling*
Attorneys for Defendants,
Houston Independent School
District, Dr. Billy Reagan
and Ms. Birdie Gipson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants [REDACTED] School District, Dr. [REDACTED] and Ms. [REDACTED] Motion in Limine has been forwarded to the attorney of record for Plaintiffs, Ms. Beatrice Mladenka-Fowler, Nelson & Mallett, P.C., 3303 Main Street, Suite 300, Houston, Texas 77002, and attorney of record of D. Gladys White, Mr. David Livingston, Dunn, Kacal, Adams, Livingston, Pappas & Law, 1800 Texas American Bank Building, 921 Main Street, Houston, Texas 77002, by hand delivery, on this the 11th day of February 1985.

Lisa Gerling
Janet Little Horton

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C.156

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED] S
ET AL. S
VS. S C.A. NO. [REDACTED]
S
[REDACTED] ET AL. S

MEMORANDUM IN SUPPORT OF [REDACTED] SCHOOL
DISTRICT, DR. [REDACTED] AND MS. [REDACTED]
MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

Houston Independent School District ([REDACTED], Dr. [REDACTED]
[REDACTED] and Ms. [REDACTED] Defen-
dants in the above-entitled and numbered cause, file this
their Memorandum in Support of Their Motion in Limine, and
as grounds therefor would show this Court the following:

1. [REDACTED] should not be allowed to
testify because he is incompetent as a witness.

[REDACTED] is a handicapped child. He is
afflicted with Prader-Willi Syndrome, which, among other
things, causes mental retardation. [REDACTED] is mentally
retarded. He is incapable of remembering the details and
relating the facts of an event accurately. He changes
details and injects fantasies into a situation when he

recalls and relates it. An affidavit of his instructor, [REDACTED] is attached hereto as Exhibit "A."

In order to be a competent witness, the witness must be able to understand the importance of telling the truth and be able to correctly recall and relate an occurrence. Someone who is mentally deficient "may be allowed to testify if he able to apprehend the obligation of an oath and give a correct account of matters he has seen or heard." Shuler v. Wainright, 491 F.2d 1213, 1223 (5th Cir. 1974). In determining the competency of a proposed mentally deficient witness, the court may make its own examination of the witness or be present when an examination is conducted by counsel. In addition, the court may consider "evidence from doctors, acquaintances, or other sources calculated to lead to a correct appraisal of the competency of the witness." Id at 1224.

In addition, [REDACTED], is incompetent as a witness because he is a child. "The ultimate test of competence of a young child is whether he has the requisite intelligence and mental capacity to understand, recall and narrate his impressions of an occurrence." United States v. Perez, 526 F.2d 859, 865 (5th Cir. 1976), citing with approval, United States v. Schoefield, 465 F.2d 560, 562 (D.C. Cir.), cert. denied, 409 U.S. 881, 93 S.Ct. 210, 34

L.Ed.2d 136 (1972). [REDACTED] cannot meet these qualifications.

The affidavit of [REDACTED] indicates that [REDACTED] does not have the capacity to receive an accurate impression of an incident, the memory sufficient to retain an independent recollection of that incident, the capacity to understand simple questions and respond accurately from his memory about the incident, nor an understanding of the obligation to speak only the truth on the stand. Schoefield, 465 F.2d at 562. Therefore, [REDACTED] is an incompetent witness and should not be allowed to testify. Allowing [REDACTED] to testify would greatly prejudice the rights of the Defendants.

2. Any evidence of any damages incurred by [REDACTED] Sr. and [REDACTED] should be excluded on the grounds that Mr. and Mrs. [REDACTED] have not pled a 42 U.S.C. § 1983 violation of any rights personal to them.

Section 1983 of the Civil Rights Act provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, in any State or Territory, or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity, or other proper proceeding for redress (emphasis added)

In order to establish a claim under § 1983, a plaintiff must show that he has suffered the deprivation of a federally protected or constitutional right and that that deprivation was caused by a person acting under color of state law. Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433, on remand, 601 F.2d 903 (5th Cir. 1979); Brown v. Miller, 631 F.2d 408 (5th Cir. 1980).

The Plaintiffs, [REDACTED] Sr. and [REDACTED] have not alleged any violation of any of their individual constitutional or federally protected rights by any person acting under color of State law. The causes of action contained in the Pretrial Order pertain only to actions which were allegedly taken against their son, on whose behalf they have asserted a cause of action under § 1983. Therefore, any evidence of any damages allegedly incurred by [REDACTED] and [REDACTED] individually should be excluded since no cause of action has been pled on their behalf individually under § 1983.

3. The testimony of [REDACTED] before the State Legislature should not be admitted.

In 1983, [REDACTED] Superintendent of Security for [REDACTED] testified before a committee of the State Legislature concerning a proposed amendment to the penal code which would by one degree the penalty for assaults on school

personnel or on school grounds. This testimony was directed at preserving the safety of teachers and school personnel.

If Plaintiffs seek to admit this testimony or refer to it in any way, it should not be allowed. The testimony is irrelevant under Federal Rule of Evidence 401 because it does not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This testimony has nothing whatsoever to do with the alleged instance made the basis of this suit, or any policies or customs of the [REDACTED] relating to the Plaintiffs.

In addition, should this Court find that the evidence is relevant, it should be excluded under Federal Rule of Evidence 403. The evidence would result in confusion of the issues, unfair prejudice to the Defendants and a waste of time. Whatever probative value this evidence might have is greatly outweighed by its prejudicial tendency.

Therefore, evidence of the testimony and the testimony itself should be excluded from the jury.

4. Testimony regarding any allegations of injury to a child by any teacher or teacher's aide at [REDACTED] Elementary School due to the use of physical force and/or physical restraint should be excluded.

In January of 1983, parents of a child at the [REDACTED] Elementary Behavior Intervention Center filed criminal

charges against a teacher and teacher's aide for injury to their son. The incident arose when the child was instructed not to buy a second lunch until he had completed his first one. He bought a second lunch anyway. As part of the behavior modification techniques used to deal with severely acting out children in the Behavior Intervention Center, the teacher and teacher's aide forced him to eat certain things from the second lunch. This was prosecuted in the criminal courts and the teacher and teacher's aide were completely exonerated. News reports of this incident were known to the [REDACTED] and they chose not to place [REDACTED] at [REDACTED] Elementary Behavior Intervention Center.

The reports of this case were sensationalized by the news media. The whole incident is totally irrelevant to the issues in the case subjudice. Testimony on this event would have no probative value and could prejudice the jury against some or all of the Defendants.

5. Any evidence of any offers of settlement or compromise should be excluded.

Pursuant to Federal Rule of Evidence 408, the Plaintiffs should not be allowed to present any evidence regarding any compromise or offers to compromise this action or any related claims.

WHEREFORE, PREMISES CONSIDERED, Defendants [REDACTED] and [REDACTED] pray that this Motion be granted and that counsel be instructed, and through such counsel the parties and witnesses on the Plaintiffs' side of the case be instructed, not to mention or in any way place before the jury panel and inject into this lawsuit the matters here and above discussed, which matters would be highly prejudicial to the rights of [REDACTED], without first approaching the bench and obtaining a ruling upon any possible theories admissibility in connection with the evidence.

Respectfully submitted,

Bracwell & Patterson

By:

Janet L. Horton
Janet L. Horton *signed by permission*
Attorneys for Defendants,
[REDACTED] School
District, Dr. [REDACTED] *Lisa Little Horton*
and [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Houston Independent School District, Dr. [REDACTED] and Ms. [REDACTED] Motion in Limine has been forwarded to the attorney of record for Plaintiffs, Ms. Beatrice Mladenka-Fowler, Nelson & Mallett, P.C., 3303 Main Street, Suite 300, Houston, Texas 77002, and attorney of record ofr D. Gladys White, Mr. David Livingston, Dunn, Kacal, Adams, Livingston, Pappas & Law, 1800 Texas American Bank Building, 921 Main Street, Houston, Texas 77002, by hand delivery, on this the 11th day of February 1985.

Lisa Little Horton
Janet Little Horton

11LGGSV

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED] JR.,
ET AL.

VS.

[REDACTED] ET AL.

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C.A. NO. [REDACTED]

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF [REDACTED]

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BEFORE ME, the undersigned authority, on this day personally appeared [REDACTED] known by me to be a credible person of lawful age, who, being duly sworn upon her oath, states as follows:

1. My name is [REDACTED]
2. I am a teacher in the [REDACTED] School District. I am currently assigned to the [REDACTED] School Behavior Intervention Center.
3. I teach behaviorally disturbed children and mentally retarded children.
4. I have been the teacher of [REDACTED] since May 1983.

5. It has been my consistent experience with [REDACTED] that he cannot accurately recall and relate events in the past. Even with an event as recent as one week past, [REDACTED] Jr. cannot relate its details without interjecting fantasies and untruths.

6. [REDACTED] Jr. performs on a third grade level.

7. [REDACTED] Jr. tends to fantasize and merges reality with fiction.

8. [REDACTED] Jr. is capable of remembering an event's occurrence.

9. [REDACTED] Jr. is not capable of relating the details of an event accurately without adding fantasies. [REDACTED] Jr. becomes confused between the truth and his fantasies.

10. In my professional opinion, [REDACTED] Jr. is not capable of recalling accurately and relating accurately the details of an incident in the past.

11. [REDACTED] Jr. does not understand the significance of an oath. He tends to ignore instructions and would likely interject nontruths even under oath. Even if he understands rules, he often does not obey them.

12. It is my opinion that because of [REDACTED]

[REDACTED]

Lisa G. Gerling
Name: Lisa G. Gerling
Notary Public in and for
Harris County, T E X A S

11LGGSY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED] Jr.,
ET AL.

VS.

[REDACTED] ET AL.

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C.A. NO. [REDACTED]

ORDER

On this day came on to be considered Defendants
[REDACTED] School District, Dr. E [REDACTED] and
[REDACTED] Motion in Limine to preclude the presen-
tation of certain evidence to the jury prior to obtaining a
ruling by this Court. This Court being of the opinion that
said Motion in Limine is meritorious and should be GRANTED
in full/in its entirety, it is, therefore,

ORDERED that the Plaintiffs, their witnesses and
attorneys, are required to refrain from mentioning or
bringing out in any manner such matters as set forth below
at any time during the trial of this cause in the presence
of the jury without first taking the matter up with the
Court:

1. Any testimony by [REDACTED] Jr. on the
grounds that he is an incompetent witness.

GRANTED/DENIED.

2. Any testimony related to damages allegedly incurred by Plaintiffs [REDACTED] Sr. and [REDACTED] individually because they have stated no cause of action for which damages may be granted for violation of their individual federally protected or constitutional right by the Defendants under 42 U.S.C. § 1983.

GRANTED/DENIED.

3. Any reference to the testimony of Mr. [REDACTED] before a committee of the State Legislature requesting an increase in penalty for perpetrators of assaults against school personnel because it is irrelevant and prejudicial and would serve to confuse the jury.

GRANTED/DENIED.

4. Any testimony regarding any allegations of injury to a child by any teacher or teacher's aide at [REDACTED] Elementary School due to use of physical force and/or restraint since it is irrelevant and prejudicial.

GRANTED/DENIED.

5. Any testimony or evidence regarding any offers to settle or compromise this action or any related disputes.

GRANTED/DENIED.

SIGNED this ____ day of _____ 1985.

JUDGE PRESIDING

11LGGSX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED] a/k/a
[REDACTED]
Plaintiff

VS.

[REDACTED] SCHOOL
DISTRICT,
Defendant

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CIVIL ACTION NO. [REDACTED]

DEFENDANT'S PROPOSED VOIR DIRE EXAMINATION
OF THE JURY PANEL

1. The Plaintiff in this case is [REDACTED] also known as [REDACTED] Do any of you know the Plaintiff? If so, in what manner, i.e., social or business?

2. Have you or anyone in your immediate family had any business or personal dealings with the Plaintiff in this case? If so:

- a. Please state the nature of such dealings;
- b. Would such dealings prevent you from being a fair and impartial juror in this case?

3. Have any of you or has any member of your immediate family ever had a dispute, claim or lawsuit against the

Plaintiff? If so, would the outcome of that dispute, claim or lawsuit prevent you from being a fair and impartial juror in this case?

4. The Plaintiff in this case will be represented by Mr. [REDACTED]. Do any of you know Mr. [REDACTED]? If so, in what manner?

5. The attorneys representing the Defendant [REDACTED] in this lawsuit are Mr. [REDACTED] and Ms. [REDACTED] of the law firm of [REDACTED] here in [REDACTED], [REDACTED].

- a. Do any of you know either Mr. [REDACTED] or Ms. [REDACTED]
- b. Have any of you had any dealings with Mr. [REDACTED] or Ms. [REDACTED]
- c. Have any of you had any dealings with the law firm of [REDACTED]

6. The defendant in this case is the [REDACTED] School District. The [REDACTED] School District is a public independent school district located in [REDACTED]. Have any of you or has any member of your immediate family ever worked for the [REDACTED] School District?

7. Do any of you know any employees who have worked for or currently work for the [REDACTED] School District?

If so:

- a. Please state the name of that employee;
- b. Please state the nature of the acquaintance; and
- c. Would your acquaintance with that person prevent you from being a fair and impartial juror in this case?

8. Have any of you or has any member of your immediate family been enrolled in the [REDACTED] School District within the past fifteen (15) years? If so,

- a. Please state the name or names of the school(s) attended;
- b. Would anything about your experience with the [REDACTED] School District prevent you from rendering a fair and impartial verdict in this case?

9. Do you or any member of your immediate family know any of the current members of the Board of Education of the [REDACTED] School District? If so, in what manner?

- a. Ms. [REDACTED]
- b. Ms. [REDACTED]

- c. Mr. [REDACTED]
- d. Ms. [REDACTED];
- e. Mr. [REDACTED]
- f. Mr. [REDACTED]
- g. Mr. [REDACTED]
- h. Ms. [REDACTED] and
- i. Ms. [REDACTED]

10. Have you or anyone in your immediate family ever had any business dealings with the [REDACTED] School District? If so:

- a. Please state the nature of such business dealings;
and
- b. Would such business dealings prevent you from
being a fair and impartial juror in this case?

11. Have any of you or has any member of your immediate family ever had a dispute, claim, or lawsuit against the [REDACTED] School District? If so, would the outcome of that dispute, claim or lawsuit prevent you from being a fair and impartial juror in this case?

12. You have previously given us your occupation as well as the occupation of your spouse. Have any of you, or your

spouse, been involved in any other occupation other than your listed occupation during the last five years? If so, what occupations have you been involved in?

13. Would any personal experiences, anything you know or any opinions you may hold about the [REDACTED] School District prevent you from being a fair and impartial juror in this case?

14. Have you or any member of your immediate family ever been a plaintiff or a defendant in a civil lawsuit? If so:

- a. Please state whether you were a plaintiff or a defendant;
- b. Please state the nature of the suit; and
- c. Please state the name of the other party or parties who were involved in the lawsuit.

15. Have you or has any member of your immediate family ever been a plaintiff or a defendant in a lawsuit involving employment? If so:

- a. Please state whether you were a plaintiff or a defendant;
- b. Please state the nature of the suit; and
- c. Please state the name of the other party or parties who were involved in the lawsuit.

16. Have you or has any member of your immediate family been a witness or a juror in a lawsuit involving employment?

If so,

- a. Please state the nature of the suit.
- b. Please describe your role as a witness and for whom and about what did you testify.

17. Have you or has any member of your immediate family been a plaintiff or a defendant in a lawsuit involving alleged violation of civil or constitutional rights? If so:

- a. Please state whether you were a plaintiff or a defendant;
- b. Please state the nature of the suit; and
- c. Please state the name of the other party or parties who were involved in the lawsuit.

18. Have you or has any member of your immediate family been a witness or a juror in a lawsuit involving alleged violation of constitutional or civil rights? If so:

- a. Please state the nature of the suit.
- b. Please describe your role as a witness and for whom and about what did you testify.

19. Have any of you or has any member of your immediate family felt that you were denied your constitutional or

civil rights, whether or not any type of formal claim or charge was filed? If so, please explain in detail:

- a. The nature of the incident;
- b. Who was involved;
- c. How you felt your constitutional rights were denied; and
- d. How the situation was resolved.

20. Have any of you or has any member of your immediate family filed a complaint with the Equal Employment Opportunity Commission?

- a. What was the outcome?
- b. Would that experience in any way keep you from being a fair and impartial juror in this case?

21. Have any of you or has any member of your immediate family ever been employed by a school district? If so?

- a. Please state the nature of such employment;
- b. Please state the name of the school district; and
- c. If they are no longer employed, what was the reason for leaving such employment?

22. Have any of you or has any member of your immediate family ever been engaged in any aspect of public employment?

If so:

- a. Please state the nature of such work;
- b. Please state the time and duration of such work;
and
- c. If you are no longer or if they are no longer so employed, what was the reason for leaving such employment?

23. The Plaintiff has listed the following witnesses who will testify on her behalf. I will read you the names of those witnesses and ask you if you know any of them. If so, in what manner? (Names to be taken from the Pretrial Order.)

24. The Defendant has listed the following witnesses who will testify on its behalf. I will read the names of those witnesses and ask you if you know any of them. If so, in what manner? (Names to be taken from the Pretrial Order.)

25. Have you or has any member of your immediate family ever sat on a jury before? If so, please state the nature of the case or cases, and whether you were able to reach a verdict.

26. Have any of you or any member of your immediate family or any friends ever been involved in any situation similar

to the incident alleged by the Plaintiffs? If so, please explain.

27. Have any of you or has any member of your immediate family ever studied law?

28. Have any of you or has any member of your immediate family ever worked in a law firm? If so,

- a. What is the name of the firm;
- b. What kind of law does the firm practice;
- c. What was your job; and
- d. How long did you work there?

29. Have any of you or has any member of your immediate family ever had a job where you were in a hiring capacity or had to screen applicants for a job? If so, please explain?

30. Do any of you believe that a plaintiff, that is, a person who sues someone else, is automatically entitled to recover something just because they brought a lawsuit?

31. Will the fact that the [REDACTED] School District is a school district, is not a person, and except as represented through its superintendent and members of its

elected board of trustees, cannot be present at this trial, in any way influence your decision in this case?

32. Do any of you believe that a school district is not entitled to come into court and defend itself as you would have the right to do if you, individually, wanted to bring a lawsuit or to defend a lawsuit?

33. Have any of you, whether from anything you have heard, seen or read outside of the courtroom, either in the news media or in personal conversation or from anything you have heard in the courtroom, formed any opinion or conclusion as to how this particular case should be decided?

34. Our judicial system provides that it is up to the plaintiff to prove her allegations by a preponderance of the credible evidence. It is not up to the Defendant to disprove the Plaintiff's charges. If the Plaintiff fails to convince you by a preponderance of the evidence that her allegations in this lawsuit are true, would any of you have difficulty returning a verdict for the Defendant?

35. The Court will explain to you that you are the sole triers of the facts of this case, but also that you must make your determination in accordance with the Court's

instructions and in accordance with the rules of law as given to you by the Court. No matter what your opinion of what the law ought to be, you are required to base your verdict on the law as given by the instructions of the Court, whether or not you personally feel such a verdict is fair. Do any of you feel that you cannot carry out this responsibility?

36. Do any of you know any fact, or is there anything in your background, which, if it were known to counsel for the Plaintiff or Defendant, might cause them to select some other juror in preference to you to sit in this case?

37. Do any of you have any defects of hearing, seeing or feeling, or any other personal or mental defect or disease which would render you unsuitable to serve on the jury of this case if chosen to do so?

38. Do any of you have any personal or business problems which would preoccupy you and which would prevent you from giving your undivided attention to this case, if selected to serve on the jury?

39. Do any of you know of any reason why you cannot fairly and impartially try the issues of this case solely on the

evidence presented and the law as given to you by the Court,
if selected to serve on the jury?

Respectfully submitted,

Robert B. Watts
T.B.A. No. 20982500

Lisa G. Gerling
T.B.A. No. 07818500

2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

Attorneys for the Defendant,
[REDACTED] School District

OF COUNSEL:

Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

79RBWSH

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED]	Plaintiff	\$	
VS.		\$	
		\$	CIVIL ACTION NO. [REDACTED]
[REDACTED]		\$	
SCHOOL DISTRICT, ET AL		\$	
		\$	
Defendants		\$	

DEFENDANTS' REQUESTED
CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument of counsel, it is my duty to give you the Court's instructions as to the laws that are applicable to this case. In arriving at your verdict, and in your deliberations, it is your duty to follow these instructions and to apply the rules of law here given to you and to find the facts of this case from the evidence introduced at the trial and in accordance with the rules of law.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any

other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Do not speculate on matters that are not in evidence, and you should never discuss this case with anyone until such time as you are discharged, except among yourselves when you have been retired to deliberate your verdict. Both the parties and public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the outcome.

This case should be considered and decided by you as an action between persons of equal standing in the community,

of equal worth, and holding the same or similar stations in life. A school district and its officers and employees are entitled to the same fair trial at your hands as a private individual. The law is a respecter of persons. All persons, including school districts, corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given his or her testimony. In weighing the testimony of a witness, you should give that testimony careful scrutiny. Consider all of the circumstances under which the witness testified, his or her appearance and demeanor while on the witness stand, his or her apparent candor and fairness, or any lack thereof, his or her intelligence, the reasonableness or unreasonableness of his or her testimony, his or her relationship to the parties in the case, the interest, if any, he or she has in the outcome of the case, and the extent to which he or she is contradicted or supported by other credible evidence. A witness may be contradicted or impeached by contradictory evidence, or by evidence that at other times the witness made statements inconsistent with his or her testimony at this trial. If you believe that a witness has sworn falsely to a material fact in the case,

you may disregard his or her testimony in whole or in part. In weighing the credibility of witnesses, you will rely on your own good judgment, your own common sense and the experience you have gained as you have gone about your everyday affairs.

The evidence in this case consists of the sworn testimony of witnesses and all exhibits admitted in evidence. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded by the Jury. You are to consider only the evidence in the case, but in your consideration of the case you are not limited to the bald statements of witnesses. On the contrary, you are permitted to draw from the facts which you find to have been proved such reasonable inferences as you deem justified in light of your own experience.

In weighing the evidence and determining the weight to be given to it, you jurors will rely upon your own good judgment, your common sense and the experience you have gained as you have gone about your everyday affairs. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony. Credible testimony simply means such testimony as you deem worthy of belief. You have the exclusive right to decide the facts under the credible

testimony, and you may believe all the testimony, you may believe none of the testimony, or you may believe any portion of it.

Statements and arguments of counsel are not evidence in this case. They are only intended to assist the Jury in understanding the evidence and the contentions of the parties. When the attorneys stipulate or agree to the existence of a fact, however, the jury must, unless otherwise instructed, regard that fact as proven.

During the trial of this case, counsel have made objections to the testimony and/or exhibits, as it is their duty to do so and it is the duty of the Court to rule on them in accordance with the law. You should not consider or be influenced by the fact that such objections have been made, whether they were sustained or overruled.

You are not bound by any opinions which you may think I have about the facts in the case for that is your exclusive prerogative and this Court has no desire to trespass upon it. If I have made any statement or comment or in any other way done anything which leads you to believe that I have any opinions about the facts of the case or feel a certain way about the credibility of any witness, you are instructed now to disregard it as you are the fact finding arm of the Court. Further, nothing in these instructions to you is

made for the purpose of suggesting or conveying to you an intimation as to what verdict I think you should find.

There are two types of evidence from which the Jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness, and the other is indirect or circumstantial evidence; that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. Direct evidence is where a witness testifies as to facts of his or her own knowledge; as to matters which he or she saw or heard; anything that a witness testifies to that comes to him or her by virtue of his or her own senses, his or her own observations.

Circumstantial evidence is where proof is given of facts and circumstances from which one may infer other connected facts which ordinarily follow in the common experience of mankind.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The burden of proving the claims made by the Plaintiff in this case is upon the Plaintiff. The burden is on the Plaintiff to prove every essential element of her claims by

a preponderance of the evidence. That means the Plaintiff must sustain her burden of proof on each of the questions you will be provided at the conclusion of this charge by a preponderance of the evidence. To sustain a burden of proof by a preponderance of the evidence means to prove that something is more likely true than not true. This means that the evidence offered by the Plaintiff must be more persuasive and more convincing than that opposed to it.

A preponderance of the evidence refers to the quality and the substance of the evidence and not to the quantity of the evidence, or the number of witnesses. It is the greater weight of all of the credible testimony. In determining whether any fact in issue has been proven by a preponderance of the evidence, you should consider the testimony of all witnesses and all exhibits received in evidence, regardless of who may have introduced them.

If upon a review of all of the evidence, you are satisfied that the Plaintiff has sustained her burden because the evidence weighing in her favor, then the Plaintiff is entitled to recover.

If you feel that the evidence is in even balance as between the two sides with respect to the Plaintiff, then the Plaintiff has failed to carry her burden, and you will find for the Defendants. Of course, if you find that the

evidence weighs in favor of the Defendants, then the Plaintiff has failed, and you will find for the Defendants.

Do not decide who you think should win and then try to answer the questions. You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers as your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

I will now summarize the contentions of the Plaintiff and of the Defendants. You should understand that my summary is not evidence, and it is for you to determine whether the evidence fairly supports the parties' contentions. My summary of these contentions is not intended in any way to indicate to you how you should determine the facts.

The Plaintiff, [REDACTED] claims damages alleged to have been sustained or suffered by her as a result of the deprivation, under color of state law, of a right secured to her both the constitution of the United States and by an act of Congress.

The Plaintiff alleges that her reassignment from French classes to additional English classes was motivated by

certain critical remarks made by her husband to Defendant [REDACTED] The Plaintiff also alleges that, because she filed and pursued a grievance concerning her reassignment, that the defendants took certain retaliatory actions against her. Specifically, the Plaintiff claims that she was given a poor evaluation, placed on probationary status and given a growth plan, and that her room was examined for material belonging to the [REDACTED] because she filed and pursued a grievance regarding her reassignment. The Plaintiff alleges that these personnel actions were motivated by her exercise of activities protected by the First Amendment to the United States Constitution. The Plaintiff claims that the Defendants have damaged her.

The Plaintiff further alleges that the acts of the Defendants as alleged were maliciously done and were motivated by actual ill will, spite, malice, or grudge against her personally. Consequently, the Plaintiff asks for an award of punitive damages in addition to the actual damages claimed by her.

The Plaintiff brings this suit under §1983 of Title 42 of the United States Code which provides that any inhabitant of this federal district may seek redress in this Court, by way of damages, against any person or persons who, under

color of any law, statute, ordinance, regulation, or custom, knowingly subjects the inhabitant to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The statute just outlined to you comprises one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Plaintiff also claims that adverse personnel decisions were motivated by her exercise of certain activities protected under the First Amendment to the United States Constitution. The First Amendment provides that:

Congress shall make no law . . . abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Defendants admit that they knowingly, under color of law, decided to reassign the Plaintiff to teaching additional English classes. The Defendants deny that personnel decisions made concerning the Plaintiff were motivated in any way by the Plaintiff's exercise of rights protected by the First Amendment.

The Defendants further deny that the Plaintiff was damaged in any way or in any amount claimed by her. The Defendants contend that the Plaintiff is not entitled to punitive damages since their actions were not taken with malice toward the Plaintiff. The Defendants allege that all personnel decisions made regarding the Plaintiff were undertaken pursuant to their lawful authority, responsibility and duty as officers and employees of the [REDACTED] School District, and that, at all times, they acted in good faith. As officers and employees of the [REDACTED] School District, the Defendants have the lawful authority and responsibility to make personnel decisions and guide the operation of the school district.

To prove a prima facie case, the Plaintiff must first prove by a preponderance of the evidence that her exercise of certain activities protected by the First Amendment were a substantial, motivating factor in the personnel decisions of the school district and the individual Defendants. If the Plaintiff meets this initial burden, the Defendants are entitled to rebut this evidence and show that they would have taken these personnel actions even if the Plaintiff had not engaged in the First Amendment activities. This means

that First Amendment conduct by the Plaintiff could have been in the minds of those responsible for reassigning the Plaintiff, for issuing her an unsatisfactory evaluation, for putting her on probation and issuing her a growth plan and for examining her room for [REDACTED] French materials not turned over to the new French teacher, and the First Amendment activity could have played a part in those decisions, so long as the same decisions would have been reached had the incident not occurred. The Plaintiff is not entitled, by engaging in conduct protected by the First Amendment, to prevent her employer from assessing her performance record and making decisions based on that record simply because the protected conduct makes the employer more certain of the correctness of its decisions. If you find from a preponderance of the evidence that the Defendants would have taken these actions regardless of the Plaintiff's involvement in any First Amendment activities, then you must return a verdict for the Defendants.

You are instructed that the following activities engaged in by the Plaintiff are protected by the First Amendment:

The individual Defendants, [REDACTED] and [REDACTED], assert that all actions they took with regard to the Plain-

tiff were taken in the good faith exercise of their official duties and responsibilities as school district employees. The issue of good faith is one of law for the Court to decide. After listening to and weighing the evidence, I have determined that Mr. [REDACTED] and Mr. [REDACTED] were using their judgment and performing discretionary functions. I have further determined that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Consequently, you will not be asked to answer any questions regarding damages against these Defendants. You must answer the other questions I give you to determine if the Plaintiff's rights have been violated.

In your consideration of the reasons given by the Defendants for the personnel decisions made regarding the Plaintiff, you do not have to find that the Defendants made a wise decision or that you would have made the same one. Under the law, an employer is entitled to make his or her own policy and business judgments and may, for example, choose to assign a teacher to teach whatever courses the superintendent feels are appropriate. While an employer's judgment or an employment matter may seem erroneous to outsiders, the relevant question is whether the reasons given for the action were permissible under the Constitution

and laws of the United States. Consequently, the focus of your deliberations is to be in the motivation of the [REDACTED] School District, its officers and employees, [REDACTED] and [REDACTED], and its Board of Education, and not on their business judgment. You are not to second guess or question the business wisdom of what the school authorities did by substituting your judgment for theirs.

If you find that any of the Plaintiff's rights, either as I have defined, or will define them to you, were violated, you must next determine whether those violations were a proximate cause of any damages to the Plaintiff. You are instructed that you are not to award damages for any condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence that such condition was proximately caused by a violation of the Plaintiff's rights. Damages is proximately caused by an act whenever it appears from a preponderance of the evidence that the damage was either a direct result of a reasonably probable consequence of the act.

There are two types of damages which you can award to the Plaintiff. Compensatory damages are to make the Plaintiff whole for something she has lost. Punitive damages are

not to make the Plaintiff whole, but are to punish the individual Defendants only. Punitive damages may not be awarded against the District. If you have found there has been a violation of the Plaintiff's rights, if any, which have proximately caused the Plaintiff damage, if any, then you may consider an award of punitive damages. You are instructed to consider such an award only if you find Mr. [REDACTED] or Mr. [REDACTED] actually injured the Plaintiff and acted with ill will, spite, malice or grudge against the Plaintiff individually. If you have not returned an award of compensatory damages, you may not consider an award of punitive damages.

You are not allowed to presume the Plaintiff has been damaged just because she shows a violation of her rights, if any. The Plaintiff must prove to you by a preponderance of the evidence that these violations, if any, have actually resulted in damages to her. Otherwise, you may award the Plaintiff only nominal damages of one dollar.

Your verdict will consist of your answers to the following questions:

17JLHSA

The following two interrogatories concerning motivation for the Plaintiff's partial reassignment from teaching French to teaching additional English classes should be submitted to the jury only if the Court determines that the Plaintiff has standing to allege a violation of her rights based on remarks made by another person and the Court determines that these remarks are protected by the First Amendment.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the critical remarks made by the Plaintiff's husband to Defendant [REDACTED] were a substantial motivating factor in the Defendant's decision to partially reassign the Plaintiff from teaching French to teaching additional English classes? 1/

Answer "We do" or "We do not".

1/ Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S.Ct. 555 (1977).

Written Interrogatory No. ____

If you have answered Written Interrogatory No. ____ "We do", answer Written Interrogatory No. ____; otherwise, do not answer Written Interrogatory No. ____.

Do you find from a preponderance of the evidence that the decision to partially reassign the Plaintiff from teaching French to teaching additional English classes would have been made regardless of the critical remarks made by the Plaintiff's husband to Defendant [REDACTED] 1/

Answer "We do" or "We do not".

1/ Mt. Healthy, supra; Village of Arlington Heights, supra.

The following six interrogatories should be submitted to the jury only if the Court determines that the Plaintiff's filing and pursuit of a grievance concerning her partial reassignment to teaching additional English classes was an activity protected the First Amendment.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Plaintiff's filing and pursuit of a grievance concerning her partial reassignment from French to additional English classes was a substantial motivating factor in the unsatisfactory evaluation given to the Plaintiff by the Defendants? 1/

Answer "We do" or "We do not".

You are instructed that the term substantial motivating factor means an important reason which, independently or together with other reasons, caused the person to take the action. 2/

1/ Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S.Ct. 555 (1977).

2/ See, Mt. Healthy, supra.

Written Interrogatory No. ____

If you have answered Written Interrogatory No. ____ "We do", answer Written Interrogatory No. ____; otherwise, do not answer Written Interrogatory No. ____.

Do you find from a preponderance of the evidence that the Plaintiff would have been issued an unsatisfactory evaluation regardless of the Plaintiff's filing in pursuit of a grievance concerning her partial reassignment to teaching additional English classes? 1/

Answer "We do" or "We do not".

You are instructed that the First Amendment activity engaged in by the Plaintiff could have been in the minds of those responsible for the personnel decisions made regarding the Plaintiff and could have played a part in making those decisions, so long as the same decisions would have been reached if the Plaintiff had not engaged in the protected activity. The Plaintiff is not entitled, by engaging in activity protected by the First Amendment, to prevent her employer from assessing her performance record and making decisions based on that record simply because the protected conduct makes the employer more certain of the correctness of its decisions. 2/

1/ Mt. Healthy, supra; Village of Arlington Heights, supra.

2/ Mt. Healthy, supra.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Plaintiff's filing and pursuit of a grievance concerning her partial reassignment to teach other English classes was a substantial motivating factor in the probationary status and the growth improvement plan given to the Plaintiff by the Defendants? 1/

Answer "We do" or "We do not".

You are instructed that the term substantial motivating factor means an important reason which, independently or together with other reasons, caused the person to take the action. 2/

1/ Mt. Healthy, supra; Village of Arlington Heights, supra.

2/ See, Mt. Healthy, supra.

Written Interrogatory No. ____

If you have answered Written Interrogatory No. ____ "We do", answer Written Interrogatory No. ____; otherwise, do not answer Written Interrogatory No. ____.

Do you find from a preponderance of the evidence that the Defendant would have been placed on probationary status and would have been given a growth improvement plan regardless of the Plaintiff's filing and pursuit of a grievance concerning her partial reassignment to teaching additional English classes? 1/

Answer "We do" or "We do not".

You are instructed that the First Amendment activity engaged in by the Plaintiff could have been in the minds of those responsible for the personnel decisions made regarding the Plaintiff and could have played a part in making those decisions, so long as the same decisions would have been reached if the Plaintiff had not engaged in the protected activity. The Plaintiff is not entitled, by engaging in activity protected by the First Amendment, to prevent her employer from assessing her performance record and making decisions based on that record simply because the protected conduct makes the employer more certain of the correctness of its decisions. 2/

1/ Mt. Healthy, supra; Village of Arlington Heights, supra.

2/ Mt. Healthy, supra.

Written Interrogatory No. ____

Do you find from a preponderance of the evidence that the Plaintiff's filing and pursuit of a grievance concerning her partial reassignment to teaching additional English classes was a substantial motivating factor in the decision of the defendants to examine the Plaintiff's room for material belonging to the District which had not been turned over to the new French teacher? 1/

Answer "We do" or "We do not".

You are instructed that the term substantial motivating factor means an important reason which, independently or together with other reasons, caused the person to take the action. 2/

1/ Mt. Healthy, supra; Village of Arlington Heights, supra.

2/ See, Mt. Healthy, supra.

Written Interrogatory No. ____

If you have answered Written Interrogatory No. ____ "We do", answer Written Interrogatory No. ____; otherwise, do not answer Written Interrogatory No. ____.

Do you find from a preponderance of the evidence that the decision to examine the Plaintiff's room to find materials belonging to the District which had not been turned over to the new French teacher would have been made regardless of the Plaintiff's filing and pursuit of a grievance concerning her partial reassignment to teaching additional English classes? 1/

Answer "We do" or "We do not".

You are instructed that the First Amendment activity engaged in by the Plaintiff could have been in the minds of those responsible for the personnel decisions made regarding the Plaintiff and could have played a part in making those decisions, so long as the same decisions would have been reached if the Plaintiff had not engaged in the protected activity. The Plaintiff is not entitled, by engaging in activity protected by the First Amendment, to prevent her employer from assessing her performance record and making decisions based on that record simply because the protected conduct makes the employer more certain of the correctness of its decisions. 2/

1/ Mt. Healthy, supra; Village of Arlington Heights, supra.

2/ Mt. Healthy, supra.

Written Interrogatory No. _____

If you found that the Plaintiff's filing and pursuit of a grievance was a substantial motivating factor in the decision to give the Plaintiff an unsatisfactory evaluation, and if you found that the Plaintiff would not have received substantially the same evaluation in the absence of her filing and pursuit of a grievance, do you find from a preponderance of the evidence that the Defendants' actions were a proximate cause of any damages to the Plaintiff, if any?

Answer "We do" or "We do not".

You are instructed that you are not to award damages for any condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence that such condition was proximately caused by the personnel decisions listed above. Damage is proximately caused by an act whenever it appears from a preponderance of the evidence that act played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act.

Written Interrogatory No. _____

If you have found that the remarks made by the Plaintiff's husband to Mr. [REDACTED] were a substantial motivating factor in the decision to reassign the Plaintiff from teaching French classes to teaching English classes, and if you have found that the reassignment would not have occurred in the absence of such remarks by the Plaintiff's husband, do you find from a preponderance of the evidence that the Defendants' actions were a proximate cause of any damages to the Plaintiff, if any?

Answer "We do" or "We do not".

Written Interrogatory No. _____

If you have found that the Plaintiff's filing and pursuit of a grievance was a substantial motivating factor in the decision to place the Plaintiff on probationary status and to issue her a growth improvement plan, and if you have found that the Plaintiff would not have been placed on probationary status and would not have been given a growth improvement plan in the absence of her filing and pursuit of a grievance, do you find from a preponderance of the evidence that the Defendants' actions were a proximate cause of any damages to the Plaintiff, if any?

Answer "We do" or "We do not".

Written Interrogatory No. _____

If you have found that the Plaintiff's filing and pursuit of a grievance was a substantial motivating factor in the decision to examine the Plaintiff's room for materials belonging to the school district which had not been turned over to the new French teacher, and if you have found that this examination of the Plaintiff's room would not have occurred in the absence of her filing and pursuit of a grievance, do you find from a preponderance of the evidence that the Defendants' actions were a proximate cause of any damages to the Plaintiff, if any?

Answer "We do" or "We do not".

The following two interrogatories concerning compensatory and punitive damages should be submitted to the jury only if the Court determines that Defendants [REDACTED] and [REDACTED] did not act in good faith. If the Court determines they acted in good faith, they are not liable for compensatory or punitive damages. The [REDACTED] School District and its Board of Trustees have not been sued for monetary relief.

Written Interrogatory No. _____

If you have answered Written Interrogatory Nos. _____, _____, _____ or _____ "We do", answer Written Interrogatory No. _____; otherwise, do not answer this Interrogatory.

What sum of money, if any, will fairly and reasonably compensate the Plaintiff for damages sustained by her, if any, as a result of the adverse personnel decisions regarding the Plaintiff, if any?

Answer in dollars and cents, if any.

\$ _____

You are instructed that the allegations of the Plaintiff as to the amount of damage she claims to have suffered are not to be considered, except that the damage claimed does fix a maximum limit, and the jury may not award the Plaintiff more than the amount claimed.

You are instructed that if the Plaintiff has not suffered any damage as a result of adverse personnel decisions, you may award her nominal damages of \$1.00 and no more.^{1/}

Reference 1: Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042 (1978); Wilson v. Taylor, 658 F. 2d 1021 (5th Cir. 1981); Laje v. R. E. Thomason General Hospital, 665 F. 2d 724 (5th Cir. 1982).

Written Interrogatory No. _____

If you have answered Written Interrogatory No. _____ in an amount in dollars and cents, 1/ answer Written Interrogatory No. _____; otherwise, do not answer Written Interrogatory No. _____.

What amount of money, if any, do you assess against the individual Defendants as punitive damages, if any. Consider each Defendant separately. You may consider an assessment of punitive damages only if you find that the particular Defendant injured the Plaintiff and that the individual Defendant's actions were the type of malevolent, outrageous or abusive conduct which indicates that the individual Defendant was motivated by ill will, spite, malice or grudge against the Plaintiff individually. 2/

You are further instructed that punitive damages can be awarded against individuals only and not the [REDACTED] School District as an entity. Punitive damages can be awarded only to punish the individual and to deter that individual from future wrongful conduct. Punitive damages cannot be awarded to compensate the Plaintiff or make her whole for any damages she might have suffered as a result of the Defendants' actions.

Answer in dollars and cents, if any.

[REDACTED] \$ _____
[REDACTED] \$ _____

Reference 1: Daly v. Moore, 491 F.2d 104 (5th Cir. 1974);
Boehne v. Southwestern Bell Telephone Co., 10 F.Supp.
788 (W.D. Tex. 1935).

Reference 2: Brown v. Bullard Independent School District,
640 F.2d 651 (5th Cir. 1981); Wooley v. Southwestern
Portland Cement Co., supra; Bennett v. Howard, supra;
Grey v. First National Bank of Dallas, note 12, supra;
Sheppard Federal Credit Union v. Palmer, supra; Guillen
v. Kuykendall, supra.

If, during the course of your deliberations, you wish to communicate with the Court, you should do so only in writing by a written note handed to the deputy marshall and signed by the foreman.

You shall now retire to the jury room to deliberate on your verdict and you may take this charge with you, as well as those exhibits that the Court has admitted into evidence. You will select your foreman, and after you have reached your verdict, you will return this charge, together with your written answers, to the foregoing Interrogatories. Do not reveal your answers until such time as you are discharged unless you are otherwise directed by me.

Your foreman will sign in the space provided after you have reached your verdict.

UNITED STATES DISTRICT JUDGE

DATE: _____

VERDICT OF THE JURY

We, the Jury, have answered the above and foregoing special issues as herein indicated, and herewith return the same into Court as our verdict.

Foreman

33JLHSH

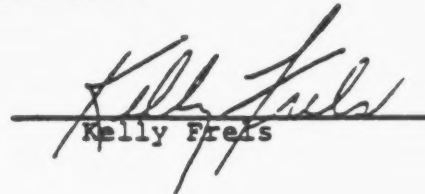
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Joint Pretrial Order has been sent to counsel of record for the Plaintiff by placing a copy of same in the United States Mail, Certified, Return Receipt Requested, on this the 10th day of January, 1984, and addressed as follows:

Mr. Larry Daves
Daves, McCabe & Hahn
P.O. Box 1115
Tyler, Texas 75710


Kelly Freis

33JLH5K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED] a/k/a
[REDACTED],

Plaintiff

VS.

[REDACTED] SCHOOL
DISTRICT,

Defendant

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§

CIVIL ACTION NO. [REDACTED]

DEFENDANT'S REQUESTED INSTRUCTIONS

747

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED] a/k/a

Plaintiff

VS.

CIVIL ACTION NO. [REDACTED]

[REDACTED] SCHOOL
DISTRICT,

Defendant

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DEFENDANT'S REQUESTED INSTRUCTION NO. 1

Introduction

Members of the Jury: Now that you have heard the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in this case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would be a violation of your sworn duty as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 2

Purpose - To Try Issues of Fact

You have been chosen and sworn as jurors in this cause to try the issues of fact presented by the allegations of the complaint of the Plaintiff, and the answer thereto of the Defendant. You are to perform this duty without bias, prejudice, sympathy, fear or favor, as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Do not speculate on matters that are not in evidence, and you should never discuss this case with anyone until such time as you are discharged, except among yourselves when you have been retired to deliberate your verdict. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 3

This case should be considered and decided by you as an action between persons of equal standing in the community of equal worth and holding the same or similar stations in life. A school district is entitled to the same fair trial at your hands as a private individual. The law is a respecter of persons. All persons, including school districts, corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

GRANTED: _____

DENIED: _____

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DEFENDANT'S REQUESTED INSTRUCTION NO. 4

Evaluation of Evidence

As the sole judges of the facts, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it. At times during the trial I may have sustained objections to questions asked without permitting the witness to answer or, where an answer had been made, I may have instructed that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I exclude from your consideration will be excluded because they are not legally admissible.

The law does not, however, require you to accept all of the evidence I shall admit, even though it may be competent. In determining what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses and determine the degree of weight you choose to give to his testimony. The testimony of a witness may fail to conform to the facts as they occurred because he is intentionally telling a falsehood, because he did not

accurately see or hear that about which he testified, because his recollection of the event is faulty, or because he has not expressed himself clearly in giving his testimony. There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability or improbability of the witness' testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determining the weight, if any, you will assign to that witness' testimony. If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together. If, how-

ever, that is not possible, you will then have to determine which of the conflicting versions you will accept.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

Types of Evidence

There are fact issues you must decide from a preponderance of the evidence. There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence - such as the testimony of an eyewitness. The other is indirect or circumstantial evidence - the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in a case, both direct and circumstantial.

GRANTED: _____

DENIED: _____

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DEFENDANT'S REQUESTED INSTRUCTION NO. 6

Consider Only Evidence Presented

In deciding each issue in this case you are to consider only the evidence presented by the parties during the trial. However, in considering such evidence, you are not limited solely to the testimony of the witnesses. You are permitted to draw from facts which you find to have been proven such deductions or conclusions as seem justified to you in light of your own reason, experience and common sense.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 7

Witnesses

You jurors will rely upon your own good judgment, your common sense, the experience you have gained as you have gone about your everyday affairs in weighing the evidence and determining the weight to be given to it. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an accident or transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from an innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the

witness has said or done some thing, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 8

Credibility of Witnesses

It is the province of the jury to decide the credibility of each witness and the weight to be given his testimony. In weighing the testimony of each witness, the jury should consider his or her relationship to the parties in the case; the witness' interest, if any, in the outcome of the case; his or her manner of testifying; his or her truthfulness, fairness and intelligence; the reasonableness or unreasonableness of his or her testimony; and the extent to which the witness has been supported, if at all, by other credible evidence. If the jury believes that a witness has sworn falsely to a material fact in the case, the jury may disregard that witness' testimony in whole or in part.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 9

Burden of Proof

Plaintiff has the burden of proving every essential element of her claims by a preponderance of the evidence.

It is important now that you understand what preponderance of the evidence means. It means to prove that something is more likely so than not so. It is the greater weight of the believable evidence. If upon any question submitted to you, you should find that the evidence is equally balanced, then the plaintiff has not sustained her burden of proof by a preponderance of the evidence on that question. A preponderance of the evidence refers to the quality and substance of the evidence, not the quantity. It does not mean that you have to believe the side with the most witnesses. It means that you should weigh all the testimony which, when considered and compared with the testimony opposed to it, has the most convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the

proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 10

Do not decide who you think should win and then try to answer the questions. You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers as your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 11

You are not bound by any opinions which you may think I have about the facts in the case for that is your exclusive prerogative and this Court has no desire to trespass upon it. If I have made any statement or comment, or in any other way done anything which leads you to believe that I have any opinions about the facts of the case or feel a certain way about the credibility of any witness, you are instructed to disregard it, as you are the factfinding arm of the Court.

Also, the fact that I give you charges on the law of damages and on other matters in this case does not in any way suggest that I believe that damages are necessarily due or not due in this case. Whether or not Plaintiff is entitled to recover and whether or not any damages are due Plaintiff are solely questions for you, the jury, to decide and no one else.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 12

Statement and Arguments of Counsel

Statements and arguments of counsel are not evidence in the case. They are only intended to assist the jury in understanding the evidence and the contentions of the parties. During the course of trial it often becomes the duty of the lawyers to make objections, and for the Court to rule on them in accordance with the law. The jury should not consider or be influenced by the fact that such objections have been made, whether they were sustained or overruled.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 13

Instruction as to Damages

The fact that I will instruct you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the proper measure of damages will be given only for your guidance, in the event that you should find in favor of Plaintiff on the question of liability, by a preponderance of the evidence and in accordance with the other instructions which you have received. You are not to award damages for any condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence that such condition was proximately caused by Defendant's violation of the Plaintiff's rights.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 14

Instruction as to Compensatory Damages

Compenstory damages are to make the Plaintiff whole for something she has lost. If you find, by a preponderance of the evidence and in accordance with all instructions given to you, in favor of the Plaintiff on the question of liability, you may give the Plaintiff nominal compensatory damages of only \$1.00 unless the Plaintiff can prove she was actually damaged.¹ Even if you find that Plaintiff's constitutional rights have been violated, you may not automatically assume that she has been damaged by this violation.² She must prove this damage, if any, to you by a preponderance of the evidence.

Reference 1: Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042 (1978).

Reference 2: Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 15

You are instructed that for a school district to be held liable for the acts or omissions of any school official which proximately caused the injury to the Plaintiff, such acts or omissions must be pursuant to formally promulgated policies or well-established customs of the school district.

1/

Policy is defined as a method or course of action officially adopted by a governmental body designed to influence and determine decisions. Custom is defined as a persistent and widespread practice which is so permanent and well-settled that it is tantamount to officially promulgated policy. 2/

Reference 1: Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978).

Reference 2: Webster v. City of Houston, No. 81-2007, slip op. (5th Cir. ~~July~~ 9, 1984) (en banc).

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GRANTED: _____
DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 16

Instruction as to Knowledge of Governing Body

You are instructed that the [REDACTED] School District cannot be held liable for damages under 42 U.S.C. §1983 unless the Board of Trustees of the [REDACTED] School District had knowledge of a custom or policy which it tolerated in violation of the Plaintiff's constitutional rights. ^{1/} The knowledge of the Board of Trustees can be either actual or constructive. Actual knowledge may be shown by such means as discussions at board meetings or receipt of written information. Constructive knowledge may be attributed to a governing body on the ground that it would have known of violations if it had properly exercised its responsibilities as, for example, where violations are so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity. ^{2/}

Reference 1: Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984).

Reference 2: See Reference 1.

GRANTED: _____

DENIED: _____

DEFENDANT'S REQUESTED INSTRUCTION NO. 17

I will now summarize the contentions of the Plaintiff and the Defendant. You should understand that my summary is not evidence, and it is for you to determine whether the evidence fairly supports the parties' contentions. My summary of these contentions is not intended in any way to indicate to you how you should determine the facts.

The Plaintiff, [REDACTED], also known as [REDACTED] claims damages alleged to have been sustained or suffered by her as a result of the deprivation, under color of state law, of a right secured to her by both the Constitution of the United States and by an act of Congress.

The Plaintiff alleges that she was constructively discharged from her teaching position. The Plaintiff alleges that the personnel actions taken by the Defendant which forced her to resign were motivated by her exercise of activities protected by the First Amendment to the United States Constitution. The Plaintiff claims that the Defendant has damaged her.

The Plaintiff also alleges that she was not rehired as as classroom teacher by the Defendant. Plaintiff alleges that the Defendant's failure to rehire her was motivated by her exercise of activities protected by the First Amendment to the United States Constitution. The Plaintiff also alleges that the Defendant's failure to rehire her was

motivated by her race, white. The Plaintiff further alleges that the Defendant's failure to rehire her was motivated by retaliation against the Plaintiff for filing charges against the Defendant with the Equal Opportunity Commission ("EEOC").

The Plaintiff brings this suit under Section 1983 of Title 42 of the United States Code, which provides that any inhabitant of this federal district may seek redress in this court, by way of damages, against any person or persons who, under color of any laws, statute, ordinance, regulation, or custom, knowingly subjects the inhabitant to deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The statute just outlined to you comprises one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

The Plaintiff also claims that the Defendant's adverse personnel actions were motivated by the Plaintiff's exercise of certain activities protected under the First Amendment to the United States Constitution. The First Amendment provides that:

Congress shall make no law . . . abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Defendant denies that it constructively discharged the Plaintiff. The Defendant admits that it did not rehire the Plaintiff as a classroom teacher. The Defendant denies that its failure to rehire the Plaintiff as a classroom teacher was motivated in any way by the Plaintiff's exercise of protected First Amendment activities, her race, or her filing of EEOC charges. The Defendant further denies that the Plaintiff was damaged in any way or in any amount claimed by her.

After listening to and weighing the evidence, I have determined that the Defendant did not constructively discharge the Plaintiff. Further, I have determined that the Defendant did not take any action against the Plaintiff because of her sex. I have further determined that the Defendant took no personnel action, prior to Plaintiff's resignation, which could be considered adverse. Consequently, you will not be asked to answer any questions regarding constructive discharge or sexual discrimination. You must answer the other questions I give you to determine if the Plaintiff's rights have been violated.

To prove her case, the Plaintiff must prove by a preponderance of the evidence that her exercise of certain activities, which I shall address later, which are protected by the First Amendment, was a substantial motivating factor in the personnel decisions of the school district. If the Plaintiff meets this initial burden, the Defendant is entitled to rebut this evidence and show that it would have taken these personnel actions even if the Plaintiff had not engaged in the First Amendment activities. This means that the First Amendment conduct by the Plaintiff could have been in the minds of those who did not rehire the Plaintiff, and the First Amendment activity could have played a part in those decisions, so long as the same decisions would have been reached had the incident not occurred. The Plaintiff is not entitled, by engaging in conduct protected by the First Amendment, to require an employer to hire her.

The Plaintiff does not have a right to be hired by the Defendant. She must have applied for a job and be considered just as any other applicant. Once she resigned, the Plaintiff had no greater right to a job than any other applicant. If you find from a preponderance of the evidence that the Defendant would not have rehired the Plaintiff regardless of her involvement in any First Amendment

activities, then you must return a verdict for the Defendant. Keep in mind that to return a verdict for the Plaintiff, you must find that the discrimination was pursuant to a custom or policy, and that the Board of Trustees knew or should have known of the custom or policy of discriminating.

You are instructed that only the Plaintiff's speech on January 28, 1976 is protected by the First Amendment. That is the only issue on Plaintiff's First Amendment claim that you are to address in determining whether the ~~XXXX~~ retaliated, or took adverse personnel action, against the Plaintiff.

To prevail under her race discrimination claim, the Plaintiff must prove to you by a preponderance of the evidence that her race, white, was a substantial motivating factor in the Defendant's decision not to rehire her; that is, that the discrimination was intentional or purposeful. The Defendant may then show a legitimate, non-discriminatory basis for its actions. If you find from a preponderance of the evidence that the Plaintiff would not have been rehired regardless of her race, then you must return a verdict for the Defendant. Keep in mind that to return a verdict for the Plaintiff, you must find that the discrimination was pursuant to a custom or policy, and that the Board of Trustees knew or should have known of the custom or policy of discriminating.

To prevail on her retaliation claim, the Plaintiff must prove that her filing of EEOC charges was a substantial motivating factor in Defendant's failure to rehire her. If you find that the Plaintiff would not have been rehired regardless of her filing of the EEOC complaints, then you must return a verdict for the Defendant. Keep in mind that to return a verdict for the Plaintiff, you must find that the discrimination was pursuant to a custom or policy, and that the Board of Trustees knew or should have known of the custom or policy of discriminating.

In your consideration of the reasons given by the Defendant for the failure to rehire the Plaintiff, you do not have to find that the Defendant made a wise decision or that you would have made the same one. Under the law, an employer is entitled to make his or her own policy and business judgments. While an employer's judgment on an employment matter may seem erroneous to outsiders, the relevant question is whether the reasons given for the action are permissible under the Constitution and laws of the United States. Consequently, the focus of your deliberations is to be the motivation of the [REDACTED] School District and not on its business judgment. You are not to second guess or question the business wisdom of what the school authorities did by substituting your judgment for theirs.

If you find that any of the Plaintiff's rights, either as I have defined, or will define them to you, were violated, you must next determine whether those violations were a proximate cause of any damages to the Plaintiff. You are instructed that you are not to award damages for any condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence that such condition was proximately caused by a violation of the Plaintiff's rights. Damages are proximately caused by an act whenever it appears from a preponderance of the evidence that the damage was either a direct result or a reasonably probable consequence of the act.

You are not allowed to presume the Plaintiff has been damaged just because she shows a violation of her rights, if any. The Plaintiff must prove to you by a preponderance of the evidence that these violations, if any, have actually resulted in damage to her. Otherwise, you may award the Plaintiff only nominal damages of one dollar. Your verdict will consist of your answers to the following questions:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED]	§	
Plaintiff	§	
VS.	§	CIVIL ACTION NO. [REDACTED]
[REDACTED]	§	
ET AL	§	
	§	
Defendants	§	

DEFENDANTS' REQUESTED
CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument of counsel, it is my duty to give you the Court's instructions as to the laws that are applicable to this case. In arriving at your verdict, and in your deliberations, it is your duty to follow these instructions and to apply the rules of law here given to you and to find the facts of this case from the evidence introduced at the trial and in accordance with the rules of law.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a

violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Do not speculate on matters that are not in evidence, and you should never discuss this case with anyone until such time as you are discharged, except among yourselves when you have been retired to deliberate your verdict. Both the parties and public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and

reach a just verdict, regardless of the outcome.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A city and its officers and employees are entitled to the same fair trial at your hands as a private individual. The law is a respecter of persons. All persons, including school districts, corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given his or her testimony. In weighing the testimony of a witness, you should give that testimony careful scrutiny. Consider all of the circumstances under which the witness testified, his or her appearance and demeanor while on the witness stand, his or her apparent candor and fairness, or any lack thereof, his or her intelligence, the reasonableness or unreasonableness of his or her testimony, his or her relationship to the parties in the case, the interest, if any, he or she has in the outcome of the case, and the extent to which he or she is contradicted or supported by

other credible evidence. A witness may be contradicted or impeached by contradictory evidence, or by evidence that at other times the witness made statements inconsistent with his or her testimony at this trial. If you believe that a witness has sworn falsely to a material fact in the case, you may disregard his or her testimony in whole or in part. In weighing the credibility of witnesses, you will rely on your own good judgment, your own common sense and the experience you have gained as you have gone about your everyday affairs.

The evidence in this case consists of the sworn testimony of witnesses and all exhibits admitted in evidence. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded by the Jury. You are to consider only the evidence in the case, but in your consideration of the case you are not limited to the bald statements of witnesses. On the contrary, you are permitted to draw from the facts which you find to have been proved such reasonable inferences as you deem justified in light of your own experience.

In weighing the evidence and determining the weight to be given to it, you jurors will rely upon your own good judgment, your common sense and the experience you have

gained as you have gone about your everyday affairs. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony. Credible testimony simply means such testimony as you deem worthy of belief. You have the exclusive right to decide the facts under the credible testimony, and you may believe all the testimony, you may believe none of the testimony, or you may believe any portion of it.

Statements and arguments of counsel are not evidence in this case. They are only intended to assist the Jury in understanding the evidence and the contentions of the parties. When the attorneys stipulate or agree to the existence of a fact, however, the jury must, unless otherwise instructed, regard that fact as proven.

During the trial of this case, counsel have made objections to the testimony and/or exhibits, as it is their duty to do so and it is the duty of the Court to rule on them in accordance with the law. You should not consider or be influenced by the fact that such objections have been made, whether they were sustained or overruled.

You are not bound by any opinions which you may think I have about the facts in the case for that is your exclusive prerogative and this Court has no desire to trespass upon

it. If I have made any statement or comment or in any other way done anything which leads you to believe that I have any opinions about the facts of the case or feel a certain way about the credibility of any witness, you are instructed now to disregard it as you are the fact finding arm of the Court. Further, nothing in these instructions to you is made for the purpose of suggesting or conveying to you an intimation as to what verdict I think you should find.

There are two types of evidence from which the Jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness, and the other is indirect or circumstantial evidence; that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. Direct evidence is where a witness testifies as to facts of his or her own knowledge; as to matters which he or she saw or heard; anything that a witness testifies to that comes to him or her by virtue of his or her own senses, his or her own observations.

Circumstantial evidence is where proof is given of facts and circumstances from which one may infer other connected facts which ordinarily follow in the common experience of mankind.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The burden of proving the claims made by the Plaintiff in this case is upon the Plaintiff. The burden is on the Plaintiff to prove every essential element of his claim by a preponderance of the evidence. That means the Plaintiff must sustain his burden of proof on each of the questions you will be provided at the conclusion of this charge by a preponderance of the evidence. To sustain a burden of proof a preponderance of the evidence means to prove that something is more likely true than not true. This means that the evidence offered by the Plaintiff must be more persuasive and more convincing than that opposed to it.

A preponderance of the evidence refers to the quality and the substance of the evidence and not to the quantity of the evidence, or the number of witnesses. It is the greater weight of all of the credible testimony. In determining whether any fact in issue has been proven by a preponderance of the evidence, you should consider the testimony of all witnesses and all exhibits received in evidence, regardless of who may have introduced them.

If upon a review of all of the evidence, you are satisfied that the Plaintiff has sustained his burden by the evidence weighing in his favor, then the Plaintiff is entitled to recover.

If you feel that the evidence is in even balance as between the two sides with respect to the Plaintiff, then the Plaintiff has failed to carry his burden, and you will find for the Defendants. Of course, if you find that the evidence weighs in favor of the Defendants, then the Plaintiff has failed, and you will find for the Defendants.

Do not decide who you think should win and then try to answer the questions. You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers as your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

I will now summarize the contentions of the Plaintiff and of the Defendants. You should understand that my summary is not evidence, and it is for you to determine whether the evidence fairly supports the parties' contentions. My summary of these contentions is not intended

in any way to indicate to you how you should determine the facts.

The Plaintiff, [REDACTED], claims damages alleged to have been sustained or suffered by him as a result of the deprivation, under color of state law, of a right secured to him both by the Constitution of the United States and by an act of Congress.

Specifically, the Plaintiff alleges that the Defendants knowingly subjected the Plaintiff to the deprivation of a right protected by the United States Constitution and the laws of the United States. The Plaintiff claims that, by terminating his employment, the City and the individual Defendants violated his constitutional right not to be deprived of his property without due process of law. The Plaintiff also claims that his good name, reputation and integrity were stigmatized because of the publication of false, damaging charges concerning the Plaintiff in conjunction with the termination of his employment. The Plaintiff also alleges that the termination of his employment was really motivated by his exercise of activities protected by the First Amendment to the United States Constitution. The Plaintiff claims that the City and the individual Defendants damaged him to the sum of \$316,932.23.

The Plaintiff further alleges that the acts of the Defendants as alleged were maliciously done and were motivated by actual ill will, spite, malice, or grudge against him personally. Consequently, the Plaintiff asks for an award of \$600,000.00 in punitive damages in addition to the actual damages claimed by him.

The Plaintiff brings this suit under §1983 of Title 42 of the United States Code which provides that any inhabitant of this federal district may seek redress in this Court, by way of damages, against any person or persons who, under color of any law, statute, ordinance, regulation, or custom, knowingly subjects the inhabitant to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The statute just outlined to you comprises one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Plaintiff also claims that the termination of his employment was motivated by his exercise of certain activi-

ties protected under the First Amendment to the United States Constitution. The First Amendment provides that:

Congress shall make no law . . . abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Defendants admit that they knowingly, under color of law, decided to terminate the Plaintiff's employment. The Defendants deny that their action deprived the Plaintiff of any property interest without due process of law, and they deny that their actions in any way stigmatized the Plaintiff's reputation, good name, and integrity. The Defendants also deny that the termination of the Plaintiff's employment was motivated in any way by the Plaintiff's exercise of rights protected by the First Amendment.

The Defendants further deny that the Plaintiff was damaged in the sum or amount claimed by him. The Defendants contend that the Plaintiff is not entitled to punitive damages since their actions were not taken with malice toward the Plaintiff. The Defendants allege that the termination of the Plaintiff's employment was undertaken pursuant to their lawful authority, responsibility and duty as officers and employees of the [REDACTED], and that in terminating the Plaintiff's employment they acted in good faith. As officers and employees of the [REDACTED]

the Defendants have the lawful authority to make personnel decisions and guide the operation of the Police Department.

In order to prove his claim, the burden is on the Plaintiff to establish, by a preponderance of the evidence in this case, the following facts:

First: That false, damaging charges or accusations about the Plaintiff were publicly made by the Defendants in conjunction with the termination of the Plaintiff's employment and stigmatized the Plaintiff's reputation, good name and integrity, thereby foreclosing future employment opportunities.

Second: That false, damaging charges or accusations about the Plaintiff were publicly made by the Defendants in conjunction with the termination of the Plaintiff's employment that deprived the Plaintiff of his federal constitutional right not to be deprived of his good name, reputation, and integrity without due process of law as that phrase is defined and explained in these instructions;

Third: That the termination of the Plaintiff's employment was ^{substantially} motivated by the Plaintiff's exercise of certain activities protected by the First Amendment to the United States Constitution;

Fourth: That the Defendant's actions in terminating the Plaintiff's employment were the proximate cause of any

consequent damage to the Plaintiff.

The Court finds, as a matter of law, that the Plaintiff did not have a property right to continue as a police officer with the [REDACTED] and that the Defendants had a legal right to terminate the Plaintiff's employment. The law did not require the Defendants to give the Plaintiff any reasons for their action or to follow any particular procedure in terminating his employment. When the Defendants terminated the Plaintiff's employment, they acted lawfully. That action does not establish the Plaintiff's claim, even though you might feel that the termination was unwarranted or unreasonable. The Plaintiff must prove by a preponderance of the evidence that the termination of his employment was an act intentionally undertaken by the individual Defendants to violate the Plaintiff's constitutional rights.

To prevail on his fourteenth amendment liberty interest claim, the Plaintiff must prove by a preponderance of the evidence that the Defendants publicly made false and damaging accusations or charges about the Plaintiff in conjunction with the termination of his employment which hurt the Plaintiff's reputation and good name and acted to foreclose future employment opportunities to him. If you find from a preponderance of the evidence that the Defendants publicly made false and damaging charges or accusations about the

Plaintiff in conjunction with the termination of his employment, and further that these charges damaged the Plaintiff's good name and reputation and foreclosed future employment opportunities, you must return a verdict for the Plaintiff on this issue. If you find from a preponderance of the evidence that no false and damaging charges or accusations against him were publicly made in conjunction with the termination of his employment, you must return a verdict for the Defendants on this issue. If you find for the Plaintiff on this issue, you must then consider whether the hearing before the Grievance Committee afforded the Plaintiff an opportunity to clear his name.

To prevail on his First Amendment claim, the Plaintiff must prove by a preponderance of the evidence that his exercise of certain activities protected by the First Amendment was a substantial, motivating factor in the decision of the City and the individual Defendants to terminate his employment contract. The Defendants have stated that they would have terminated the Plaintiff's employment regardless of his exercise of activities protected by the First Amendment. If you find from a preponderance of the evidence that the Defendants failed to renew the Plaintiff's contract because the Plaintiff exercised these protected activities, then you should return a verdict for the Plain-

tiff on that issue. If you find from a preponderance of the evidence that the Defendants would have terminated the Plaintiff's employment regardless of the Plaintiff's involvement in any First Amendment activities, then you must return a verdict for the Defendants.

The individual Defendants, [REDACTED] and [REDACTED] assert that all actions they took with regard to the Plaintiff were taken in the good faith exercise of their official duties and responsibilities as city employees. If you find from a preponderance of the evidence that their actions were taken in good faith and not in disregard for the Plaintiff's clearly established constitutional rights, and I will define them to you, you must find that they acted in good faith. If you find from a preponderance of the evidence that the individual Defendants did not act in good faith or that they acted with knowledge that their actions with respect to the Plaintiff were clearly in disregard for the Plaintiff's clearly established constitutional rights, you must find that they did not act in good faith.

In your consideration of the reasons given by the Defendants for the termination of the Plaintiff's employment, you do not have to find that the Defendants made a wise decision or that you would have made the same one.

Under the law, an employer is entitled to make his own policy and business judgments and may, for example, choose not to continue to employ an adequate or even an outstanding employee so long as the decision not to offer further employment is not for an unlawful reason. While an employer's judgment or an employment matter may seem erroneous to outsiders, the relevant question is whether the reasons given for the termination of the Plaintiff's employment were permissible under the Constitution and laws of the United States. Consequently, the focus of your deliberations is to be in the motivation of the [REDACTED] and its officers and employees, [REDACTED], and not on their business judgment. If you find from a preponderance of the evidence that the decision to terminate the Plaintiff's employment with the [REDACTED] Police Department was based on reasons permissible under the Constitution and laws of the United States, then you must return a verdict for the [REDACTED] and its officers and employees, [REDACTED].

Your verdict will consist of your answers to the following questions:

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Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Plaintiff's reputation was stigmatized by the Defendants having publically made false and damaging charges or accusations about the Plaintiff in conjunction with the termination of his employment?

Answer "We do" or "We do not".

You are instructed that the Plaintiff's reputation could be stigmatized only if false and damaging charges or accusations about the Plaintiff were publicly made by the City of [REDACTED] in conjunction with the termination of the Plaintiff's employment.

You are instructed that the termination of employment by the City of [REDACTED] is not such a blight upon that person's good name, reputation, honor and integrity as to constitute a deprivation of liberty.

You are further instructed that the Plaintiff could not be stigmatized by the mere existence of derogatory information in his personnel file if such information has not been made public by the City of [REDACTED] in conjunction with the termination of employment.

You are instructed that the Plaintiff's reputation was not stigmatized in conjunction with the termination of his employment if the circumstances surrounding and the reasons for the termination became public information because of the actions of the Plaintiff in requesting a hearing before the City's grievance committee or by reason of the fact that this information has become public because of the Plaintiff's actions in filing this lawsuit, and in pursuing other legal activities involving the City. You are further instructed not to consider any newspaper articles or media reports concerning any of these activities.

Reference 1: Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976); Dennis v. S&S Consolidated Rural High School District, 577 F.2d 338 (5th Cir. 1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976); Kaprelian v. Texas Women's University, 509 F.2d 133 (5th Cir. 1975);

La Borde v. Franklin Parrish School Board, 510 F.2d 590 (5th Cir. 1975).

Reference 2: Dennis, supra; Bishop v. Wood, supra.

Reference 3: Walker v. Alexander, 569 F.2d 291 (5th Cir. 1978); Ortwein v. Mackey, 511 F.2d 696 (5th Cir. 1975); Kaprelian, supra; Simms v. Fox, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415 (1975); Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974).

Reference 4: Cato v. Collins, 539 F.2d 656 (8th Cir. 1976).

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Plaintiff's oral testimony before the state grand jury was a substantial motivating factor in the Defendants' decision to terminate the Plaintiff's employment?

Answer "We do" or "We do not".

Reference 1: Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555 (1977).

Written Interrogatory No. _____

If you have answered Written Interrogatory No. ____ "We do", answer Written Interrogatory No. ____; otherwise, do not answer Written Interrogatory No. ____.

Do you find from a preponderance of the evidence that the decision to terminate the Plaintiff would have been made regardless of the Plaintiff's oral testimony before the grand jury?

Answer "We do" or "We do not".

Reference 1: Mt. Healthy, supra; Village of Arlington Heights, supra.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that future employment opportunities have been foreclosed to the Plaintiff by the City of [REDACTED] having made false and damaging charges or accusations about the Plaintiff in conjunction with the termination of the Plaintiff's employment?

Answer "We do" or "We do not".

You are instructed that the Plaintiff's future job opportunities could have been foreclosed if false and damaging charges or accusations about the Plaintiff were publicly made by the City of [REDACTED] in conjunction with the termination of the Plaintiff's employment with the City.

You are instructed that the mere proof that a record of nonretention in one job might make the Plaintiff less attractive to some other employers does not establish the kind of foreclosure of employment opportunities amounting to deprivation of employment opportunities.

You are instructed not to consider the existence of newspaper or other media reports of the hearing before the City's Grievance Committee, the filing of this lawsuit or the Plaintiff having pursued other legal activities with the City.

Reference 1: Dennis, supra.

Reference 2: Paul v. Davis, supra; Dennis v. S&S Consolidated Rural School District, supra; Bishop v. Wood, supra; Kaprelian v. Texas Women's University, supra; LaBorde, supra.

Reference 3: Board of Regents of State College v. Roth, supra; Bishop v. Wood, supra.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Defendants' actions in terminating the Plaintiff's employment were a proximate cause of any damages to the Plaintiff, if any?

Answer "We do" or "We do not".

You are instructed that you are not to award damages for any condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence that such condition was proximately caused by the termination of the Plaintiff's employment. Damage is proximately caused by an act whenever it appears from a preponderance of the evidence that the act played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act.

Written Interrogatory No. _____

What sum of money, if any, will fairly and reasonably compensate the Plaintiff for damages sustained by him, if any, as a result of any wrongful actions of the Defendants found above, if any?

Answer in dollars and cents, if any.

\$ _____

You are instructed that the allegations of the complaint as to the amount of damage the Plaintiff claims to have suffered are not to be considered, except that the damage claimed does fix a maximum limit, and the jury may not award the Plaintiff more than the amount claimed.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Plaintiff failed to take reasonable actions to mitigate the damages to the Plaintiff, if any?

Answer "We do" or "We do not".

You are instructed that the Plaintiff had a duty to use reasonable diligence and reasonable means under the circumstances to obtain employment after his employment with the [REDACTED] Police Department was terminated.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that any one or more of the following Defendants acted in good faith in the actions they took with regard to the termination of the Plaintiff's employment, if any.

Answer "Yes" or "No" as to each Defendant.

[REDACTED]

You are instructed that the individual Defendants acted in good faith if they did not know and should not have known that their actions would violate the Plaintiff's clearly established constitutional rights.¹

You are further instructed that clearly established constitutional rights are those rights which are undisputed as applied in reported decisions of the Supreme Court of the United States or the United States Court of Appeals for the Fifth Circuit in circumstances identical to or closely analogous to the circumstances of this case.

In this case, you are instructed that the Plaintiff had a clearly established constitutional right to engage in the following activities:

1 You are further instructed that any one or more of the Defendants acted in good faith in the actions he took with regard to the termination of the Plaintiff's employment if any one or more of them took such action without malicious intent to violate the Plaintiff's clearly established constitutional rights.²

You are instructed that an action is maliciously done if the person taking the action is motivated by ill will,³ spite, malice or grudge toward the Plaintiff individually.³

Reference 1: Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975).

Reference 2: See Reference 1.

Reference 3: Wooley v. Southwestern Portland Cement Co., 272 F.2d 906 (5th Cir. 1959); Bennett v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943); Grey v. First National Bank of Dallas, 393 F.2d 371 (5th Cir. 1968); Sheppard Federal Credit Union v. Palmer, 408 F.2d 1369 (5th Cir. 1969); Guillen v. Kuykendall, 470 F.2d 745 (5th Cir. 1972).

Written Interrogatory No. _____

If you have answered Written Interrogatory No. _____ in an amount in dollars and cents, answer Written Interrogatory No. _____; otherwise, do not answer Written Interrogatory No. _____.

What amount of money, if any, do you assess against the individual Defendants as punitive damages, if any. Consider each Defendant separately. You may consider an assessment of punitive damages only if you find that the particular Defendant injured the Plaintiff and that the individual Defendant's actions were the type of malevolent, outrageous or abusive conduct which indicates that the individual Defendant was motivated by ill will, spite, malice or grudge against the Plaintiff individually.

You are further instructed that punitive damages can be awarded against individuals only and not the City of _____ as an entity. Punitive damages can be awarded only to punish the individual and to deter that individual from future wrongful conduct. Punitive damages cannot be awarded to compensate the Plaintiff or make him whole for any damages he might have suffered as a result of the Defendants' actions.

Answer in dollars and cents, if any.

\$ _____
\$ _____
\$ _____

Reference 1: Daly v. Moore, 491 F.2d 104 (5th Cir. 1974); Boehne v. Southwestern Bell Telephone Co., 10 F.Supp. 788 (W.D. Tex. 1935).

Reference 2: Brown v. Bullard Independent School District, 640 F.2d 651 (5th Cir. 1981); Wooley v. Southwestern Portland Cement Co, supra; Bennett v. Howard, supra; Grey v. First National Bank of Dallas, note 12, supra; Sheppard Federal Credit Union v. Palmer, supra; Guillen v. Kuykendall, supra.

Written Interrogatory No. _____

Do you find from a preponderance of the evidence that the Defendants' decision to terminate the Plaintiff was based on the belief that the Plaintiff prepared an intentionally false written statement concerning the events of July 17, 1978?

Answer "We do" or "We do not".

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If, during the course of your deliberations, you wish to communicate with the Court, you should do so only in writing by a written note handed to the deputy marshall and signed by the foreman.

You shall now retire to the jury room to deliberate on your verdict and you may take this charge with you, as well as those exhibits that the Court has admitted into evidence. You will select your foreman, and after you have reached your verdict, you will return this charge, together with your written answers, to the foregoing Interrogatories. Do not reveal your answers until such time as you are discharged unless you are otherwise directed by me.

Your foreman will sign in the space provided after you have reached your verdict.

UNITED STATES DISTRICT JUDGE

DATE: _____

VERDICT OF THE JURY

We, the Jury, have answered the above and foregoing special issues as herein indicated, and herewith return the same into Court as our verdict.

Foreman

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED]	§	
	§	
Plaintiff	§	
	§	
V.	§	C.A. NO. [REDACTED]
[REDACTED]	§	
	§	
SCHOOL DISTRICT, ET AL.	§	
	§	
Defendants	§	

MEMORANDUM OF AUTHORITIES
IN SUPPORT OF THE DEFENDANT, [REDACTED]
REQUESTED CHARGE TO THE JURY

TO THE HONORABLE JUDGE OF THE COURT:

COMES NOW the Defendant, [REDACTED] and files this his Memorandum of Authorities in Support of his Requested Charge to the Jury, and in support thereof would show unto the Court the following:

I. Setting of the Case

This is a case brought by an employee of the [REDACTED] [REDACTED] School District against the school district, its board of trustees, its superintendent, and its director of federal programs, alleging a violation of her civil rights. The Plaintiff alleges that her transfer from a supervisory position in the migrant program to a classroom teaching position was in retaliation for exercise of her first amendment rights, namely freedom of speech and freedom

of association. The Plaintiff also alleges that she was discriminated against because she is a female. The Defendants contend that the Plaintiff was not discriminated against in any way and that her transfer was due solely to a reduction in funding by the federal government.

II. First Amendment Claims

In any claim alleging a violation of First Amendment free speech rights, a plaintiff must first demonstrate that his or her speech is protected by the United States Constitution. Connick v. Myers, ___ U.S. ___, 103 S.Ct. 1684 (1983); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968). The issue of whether speech is protected is one of law for the court to decide. Connick v. Myers, supra, 103 S.Ct. at 1690, n.7.

In an action alleging a violation of the Plaintiff's first amendment rights, the Plaintiff must first show that her speech is related to a matter of legitimate public concern. Connick v. Myers, supra. The Court stated:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate form in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to an employee's behavior.

Connick v. Myers, supra, 103 S.Ct. at 1690.

The Court in Connick went on to state that whether an employee's speech addressed a matter of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record." Connick v. Myers, supra, 103 S.Ct. at 1690.

The first factor to be considered is content, and it deals primarily with the subject matter of the exercised speech. In the instant case there is no evidence to suggest that the counting of students or the procedures utilized in the migrant program was a matter of public concern. The Plaintiff was simply criticizing the administration of and procedures utilized in the migrant program within which she was employed. There is no evidence that the public was interested in her criticisms.

Secondly, the form of speech must be considered. Mere public distribution of the subject matter does not transform the speech into a public concern. In the case at hand, no public distribution occurred, and the Plaintiff merely informed her superiors of her concerns. Even if her complaint was made to the school board at a public meeting, the Plaintiff's speech is not automatically transformed into a public concern.

Lastly, the context of the exercise of speech must be reviewed. A determination must be made as to whether the

speech is an item of public debate interest and/or concern. Again, no evidence exists to indicate that the administration of the migrant program was a topic of public concern or interest in the area of the [REDACTED] School District [REDACTED]

The Connick analysis was used and applied in a case factually similar to the case of sub judice. In Mahaffey v. Kansas Board of Regents, 562 F.Supp. 887 (D. Kan. 1983), a faculty member made statements to his peers and students in opposition to the reorganization of a college department, teacher's own salary increases, perquisites and other matters. The court held that these items to be individual, not public, concern. In its analysis, the Court examined the form and context of the speech: "An individual cannot bootstrap his individual grievance into a matter of public concern either by bruiting his complaint to the world or by invoking a supposed public interest in all aspects of the way public institutions are run." Id. at 890. Thus, an individual's speech must legitimately be a matter of "public concern" to be protected under the First Amendment.

In the instant case, there is no evidence that the Plaintiff was speaking out as a citizen upon a public concern when she criticized the migrant program. Instead the evidence demonstrates that she was merely speaking out as an

employee on matters of personal concern.

Even the Plaintiff's expression was a matter of public concern, the Defendants are still entitled to judgment because the interest of the [REDACTED] and its employees, in promoting the efficiency of the public service preforms through its employees, outweigh the interests of the Plaintiff in commenting upon matters of public concern. This balancing test was enunciated in Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 ___ S.Ct. ___, (1968). Under this balancing test, which has been followed consistently since its enunciation, if the employee establishes that his speech is entitled to protection, the school district must show that its actions were justified given its interest in promoting the efficient and effective operation of schools.

Factors examined and applied in the balancing test is stated in Pickering and his progeny, including Connick, include:

- 1) Whether the speech might threaten either discipline by immediate supervisors or harmony among coworkers
- 2) Whether the employee's speech reflected a difference of opinion on an issue of genuine public concern in which free and open debate is

vital to inform decision making by the electorate.

- 3) Whether the employee's relationship with the target of his speech was a working relationship for which personal loyalty and confidence was necessary.
- 4) The need for harmony in the office or work place.
- 5) The degree of public interest in the speech.
- 6) Whether the employer has exercised the discretion necessary for the proper management of internal affairs and personal decisions of the government agency.
- 7) Whether the government's responsibility requires a close working relationship to exist between the plaintiff and coworkers and the speech in question has caused or could cause a relationship to deteriorate.
- 8) The context in which the speech arose.

In applying the factors of the Pickering balancing test to the speech of the Plaintiff in the instant case, the balance results in favor of the interest of the school district in promoting the efficiency of the public services it performs. Unlike the Plaintiff in Pickering, who made his complaint to a newspaper, the Plaintiff in this case

directed her speech toward her supervisors whom she would normally contact in the course of her daily work. Further, the speech could have threatened the harmony among co-workers within the migrant program. Furthermore, the employee's speech did not reflect a difference of opinion on an issue of general public concern on which free and open debate was vital to the informed decision making by the electorate. The speech was a personal criticism of the program and its administration.

If this court should find, however, that the speech of the Plaintiff is protected, then the Plaintiff must prove by a preponderance that her speech was a substantial or motivating factor behind the school system's action of which she complains.

The substantial or motivating factor test was set out in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). The Court in that case held that:

. . . the burden . . . [is upon the plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" - - or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Mt. Healthy, Supra, 429 U.S. at 287.

Thus, if the protected speech was not a substantial or motivating factor behind the school system's action, then

there is no violation of protected speech. As in the case at hand, the substantial and motivating factor behind the personnel decision to eliminate the position held by the Plaintiff was the reduction in migrant program federal funds and not the speech of the Plaintiff.

Yet even if protected speech was a substantial or motivating factor behind the school district's decision to transfer the Plaintiff, the court in Mt. Healthy noted that:

A determination should have been made as to whether the Board had shown by preponderance of the evidence that it would have reached the same decision as to the respondent's reemployment even in the absence of the protected conduct.

Mt. Healthy, Supra, 429 U.S. at 287.

In other words, in order for the Plaintiff to prevail, the evidence must show that, but for the protected conduct, the school system would not have taken the action about which the Plaintiff complains. Thus, even if the Plaintiff proves that the protected speech was a substantial or motivating factor in the school system's decision, the school system can defend itself by proving by a preponderance of the evidence that it would have reached the same decision regardless of the employee's protected conduct. In this case, despite the Plaintiff's alleged protected speech, the school system can show by a preponderance of evidence it

would have reached the same decision because of the reduction in federal funds for the migrant program.

The Plaintiff has also alleged that her association with [REDACTED] was a substantial or motivating factor in the District's decision to nonrenew her employment as a supervisor in the Migrant program. She claims that such alleged action violates her rights to freedom of association under the First Amendment. The Plaintiff's allegations are grounded in the fact that she and [REDACTED] are roommates. That is, they are friends. However, mere friendship is not the type of association which is protected by the First Amendment.

The District Court in Burris v. Willis Independent School District, 537 F.Supp 801, 806 (S.D. Tex. 1982), aff'd in part, rev'd in part, 713 F.2d 1087 (5th Cir. 1983), discussed a similar claim and found:

At trial Plaintiff was unable to show any relationship between himself and others except association in its simplest form--friendship. There was no showing of combination for any political purpose, or for the furtherance of any particular school program, policy or objective. . . . this Court is convinced that the Constitution will not be interpreted to protect mere personal affinity in cases where the association bears no relationship to the expression of beliefs or ideas. Cf. NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed. 2d 1488 (1958). Protection of simple friendship would unreasonably and pervasively limit the exercise of legitimate governmental prerogative. "Association" in this sense

certainly does not invoke an interest which lies close to the core of the first amendment.

In the case sub judice, the Plaintiff has not alleged an associational interest which is protected by the First Amendment. Such a claim should be dismissed.

However, should the Court find that the association is protected, the Mt. Healthy test would be applicable to the burden of proof.

III. Sex Discrimination Claim

In an action alleging gender discrimination under 42 U.S.C. §1983 (Section 1983), a plaintiff must prove purposeful discrimination on the part of a defendant. Washington v. Davis, 426 U.S. 229, 56 S.Ct. 2040 (1976); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282 (1979); Lee v. Washington County Board of Education, 625 F.2d 1235 (5th Cir. 1980); Williams v. DeKalb County, 528 F.2d 2 (5th Cir. 1978); Nevitt v. Sides, 571 F.2d 209 (5th Cir. 1978); Wallace v. The City of New Orleans, 654 F.2d 1042 (5th Cir. 1981); General Building Contractors Association v. Pennsylvania, _____ U.S. _____, 102 S.Ct. 3141 (1982).

In order to prove a violation of these statutes, a plaintiff must first establish a prima facie case of gender-based discrimination. As stated in Lee v. Washington County

Board of Education, supra:

The showing of discriminatory purpose is required to prove a prima facie case of discrimination under 42 U.S.C. §§1981 and 1983. 625 F.2d at 1237. See, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555 (1977); Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978). See generally, Ramirez v. Sloss, 615 F.2d 163, 168 n. 8 (5th Cir. 1980).

As noted above, the Plaintiff must show discriminatory purpose on the part of the Defendants to establish a prima facie case of discrimination. Unless a showing of purposeful and intentional discrimination is made by the Plaintiff, no prima facie case is made. The Defendants maintain that the Plaintiff can make no such showing in the instant case. If no prima facie case is established, the Defendants need not put forth evidence to rebut the charge of discrimination and are entitled to judgment on the claims made under 42 U.S.C. §1983. FED R. CIV. P. 41(b).

The Supreme Court discussed the type of "purpose" necessary to show a discriminatory intent in Personnel Administrators of Massachusetts v. Feeney, supra, 442 U.S. at 279:

"Discriminatory purpose", however, implies more than intent as volition or intent as awareness of consequences. (Citation omitted). It implies that the decision-maker, in this case the State Legislature, selected or affirmed a particular course of action at least in part "because of,"

not merely "in spite of", its adverse effects upon an identifiable group.

A plaintiff must, therefore, show that a defendant's action was taken because of its desire to discriminate and that the action taken did, in fact, achieve that discriminatory purpose. A plaintiff must show that a defendant made its decision to terminate the plaintiff's employment because of his or her gender. The Defendants in the case at hand assert that the Plaintiff was not terminated because of her gender. Only if such a prima facie showing is made by the Plaintiff do the Defendants need to present evidence to rebut the charge of discrimination. While the Defendants must present evidence to rebut a prima facie case (i.e., a showing of termination for non-discriminatory reasons such as a reduction in federal funding for the migrant program), if established, the ultimate burden of proof remains with the plaintiff.

IV. IMMUNITY

The Plaintiff also seeks to hold [REDACTED] liable under Section 1983 in his individual capacity. Even if the Plaintiff could make out a case under Section 1983, [REDACTED] is still entitled to judgment because he is immune from liability with respect to the Plaintiff's First Amendment claims. The actions taken by [REDACTED] were taken

by the [REDACTED] were taken in the good faith exercise of his official duties. His actions did not violate any clearly-established constitutional rights of the Plaintiff which existed at the time of the actions in question. As such, [REDACTED] is entitled to official immunity. Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727 (1982).

In the case sub judice, the Plaintiff does not have a valid First Amendment claim concerning either her speech or her relationship with [REDACTED]. Therefore, [REDACTED] could not have violated the Plaintiff's clearly established constitutional rights. Even if the Plaintiff has a cognizable First Amendment claim, any such rights were not clearly established at the time of the relevant actions. Connick v. Myers, supra; Burris v. Willis Independent School District, supra.

The actions taken by [REDACTED] also are protected by legislative immunity. Decisions made in a legislative capacity by the governing body of a political subdivision are immune from suit. Lake County Estates v. Tahoe Planning Agency, 440 U.S. 391, 99 S.Ct. 1171 (1979); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); cert. denied, ___ U.S. ___, 102 S.Ct. 1251 (1982); Burris v. Willis Independent School District, supra. While [REDACTED] is not a member of the Board of Trustees, his

recommendations concerning the deletion of various positions because of a reduction in funds is a legislative decision which should also be protected and immune from suit.

V. DAMAGES

The Plaintiff is not entitled to damages for any alleged damage to her reputation or foreclosure of future employment. Such damages are only recoverable in a §1983 case if a stigmatizing statement about the Plaintiff is made in the course of nonrenewal. Dennis v. S&S Consolidated Rural High School District, 577 F.2d 338 (5th Cir. 1978); Hufstutler v. Bergland, 607 F.2d 1090 (5th Cir. 1979); Ball v. Board of Trustees of Kerville Independent School District, 584 F.2d 684 (5th Cir. 1978). To be actionable, the communication must be truly stigmatizing in the sense of ruining the person's good name or placing upon them a "badge of infamy." Ball v. Board of Trustees, *supra*.

In the instant case there is no cause of action for the Plaintiff. First, she was not relieved of any employment. She was transferred to another position. Second, no stigmatizing remarks were made about the Plaintiff. Therefore, the Plaintiff has no cause of action.

The Plaintiff also has no action against [REDACTED] for punitive damages in this case. In Smith v. Wade, ____

U.S. ___, 103 S.Ct. 1625, 1640 (1983), the Supreme Court held:

. . . a jury may be permitted to assess punitive damages in an action under §1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

In the case sub judice, there is no evidence that [REDACTED] acted with an evil motive or with reckless or callous indifference to the Plaintiff's rights.

VI. CONCLUSION

The Plaintiff in this case is not entitled to relief because her first amendment rights were not violated as a result of her transfer from a supervisory position within the migrant program to a teaching position. The transfer was made solely because of reduction in federal funding for the migrant program.

Further, the speech exercised by the Plaintiff was not a matter of legitimate public concern and therefore is not protected by the first amendment. Yet even if the speech is protected, the action of the school board is justified in light of its interest to promote the efficient operation of its schools and programs. Moreover, the speech was not a substantial or motivating factor in the school board's decision to transfer the Plaintiff. Yet if the speech is

protected and it was a substantial and motivating factor in the school board's decision, the school board would have taken the same action in transferring the Plaintiff regardless of the protected speech due to the reduction of funds. The Defendants are therefore not liable to the Plaintiff for any damages as a result of a first amendment violation.

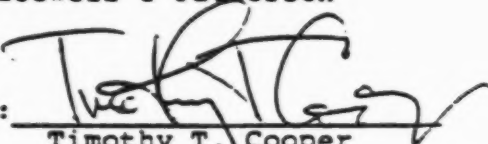
Similarly, the Plaintiff in this case is not entitled to relief on her sex discrimination claim. She was neither intentionally nor purposefully discriminated against on the basis of her gender. She was not subject to disparate treatment based upon her gender from that accorded similarly situated employees within the [REDACTED] School District.

As such, the Defendants respectfully request that this Court consider this Memorandum, and that, after trial, this Court enter judgment for the Defendants on all issues in this case.

Respectfully submitted,

Bracewell & Patterson

By:


Timothy T. Cooper
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED]	§	
Plaintiff	§	
V.	§	CIVIL ACTION NO. [REDACTED]
[REDACTED] SCHOOL	§	
DISTRICT and [REDACTED]	§	
Defendants	§	

DEFENDANTS' MOTION FOR DIRECTED VERDICT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Defendants, The [REDACTED] School District [REDACTED] and [REDACTED] and file this their Motion for Directed Verdict, and in support thereof would show unto the Court the following:

I.

Before a Plaintiff can establish a prima facie case of discrimination based upon age, the Plaintiff must show: (1) that she is a member of the protected group, (2) that she was discharged, (3) that she was replaced with someone outside the protected class, and (4) that she was qualified to do the job and was performing her job at the level that met the legitimate expectations of her employer. In order for the Plaintiff to show a prima facie case of retaliation, the Plaintiff must show: (1) that she engaged in protected activity, (2) that subsequently adverse action was taken against her, and (3) that there is a causal link between the employee's action and the employer's action.

II.

Defendants' Motion should be granted because, as a matter of law, there is no evidence to submit to the jury that Plaintiff met the "legitimate expectations" of her

employer, the [REDACTED] as required by Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979). Therefore, as a matter of law, Plaintiff is not even entitled to submit to the jury any issue with respect to age discrimination.

Alternatively and without waiving the foregoing, there is no evidence, as a matter of law, to submit to the jury that Plaintiff was discriminated against because of her age or because of retaliatory action against her for her filing a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). To the contrary, all the evidence establishes that:

1. Plaintiff was put on notice that, absent drastic improvement, she would be recommended for termination. This action occurred prior to any filing by Plaintiff with the EEOC.
2. Plaintiff was re-assigned to a second grade class by her Principal without the Principal's knowledge of Plaintiff's filing of any charges with the EEOC.
3. Through all relevant time periods herein, Plaintiff received no reduction in her salary nor increase in her working hours. Her position as a probationary teacher was never altered.
4. All action taken by the [REDACTED] was totally unrelated to Plaintiff's age or her filing of any charges of age discrimination with the EEOC.
5. The subsequent action by Plaintiff in filing a second charge with the EEOC is irrelevant. The Teacher Hearing Committee of the [REDACTED] had already unanimously voted to recommend termination of her employment with the District. More importantly, there is no

evidence that the Board of Trustees itself, when it terminated Plaintiff's position with the District on March 6, 1980 had any knowledge whatsoever of the filing by Plaintiff of any charges with the EEOC including the charges filed on July 2, 1979 and January 21, 1980.

6. There is no evidence that the Teacher Hearing Committee, who recommended the termination of Plaintiff on January 9, 1980, had any knowledge whatsoever of the filing by Plaintiff of any charges with the EEOC.

III.

In addition to the foregoing, this Court should also grant Defendants' Motion for Directed Verdict because:

1. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that the Defendants:

- (a) Harassed or in any way discriminated against the Plaintiff because of age;
- (b) Harassed the Plaintiff because of the filing of an EEOC complaint;
- (c) Terminated the Plaintiff because of her age;
- (d) Terminated the Plaintiff because of the filing of an EEOC charge.

2. There is no evidence before this Court or there is insufficient evidence to warrant a finding that the Plaintiff was performing her job at a level that met her employer's legitimate expectations.

3. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that the Plaintiff was qualified to do her job.

4. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding

that there is any causal link, i.e., any inference of any kind of discrimination, between the Plaintiff's filing of an EEOC complaint and the alleged harassment and/or termination claimed by the Plaintiff.

5. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that age or any retaliatory motive played any role in any of the actions taken by the Defendants in this case.

6. There is no evidence before this Court or there is insufficient evidence before this Court that the Defendant knew the age of the Plaintiff.

7. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding:

- (a) That the Plaintiff was removed from her position in January, 1979 in order that space could be acquired for the placement of the younger teachers.
- (b) That the Defendants directed the Plaintiff to seek alternative positions within the [REDACTED] because she refused to comply with the alleged discriminatory demands made upon her by the Defendants or that such directions were not imposed upon younger employees.
- (c) That the Defendants harassed or directed antagonism towards the Plaintiff when she made attempts to comply with the alleged demand that she seek alternative employment.
- (d) That Plaintiff was demoted to floating teacher status and then reprimanded for allegedly "built-in" conditions that could not be attributed to the Plaintiff herself.
- (e) That the Defendants required the Plaintiff to supply information and records which she had

no access to and reprimanded the Plaintiff when she was unable to present the information to the Defendants. That any record keeping was imposed upon the Plaintiff that was not imposed on all employees.

- (f) That the Defendants reprimanded the Plaintiff when she tried to improve upon the allegedly inadequate instructional system created by the discriminatory practices of the ~~XXXXXX~~
- (g) That the Defendants required the Plaintiff to maintain an orderly coordinated classroom management and then reprimanded her when efforts were made to comply with the demands, or that no charges of corporal punishment violations were made against younger teachers.
- (h) That the Defendants required the Plaintiff to follow certain discriminatory guidelines which were not imposed upon younger employees.
- (i) That the Defendants denied the Plaintiff of the privileges and facilities which were accorded younger employees.
- (j) That the Defendants and its agents without due justification caused to be placed in Plaintiff's employment file all reprimands, derogatory information, and generally unfavorable marks which were not included or even required to be a part of the employment files of younger employees.
- (k) That the Defendants harassed the Plaintiff or in any way discriminated against her subsequent to her filing of a charge of age discrimination with the EEOC on July 2, 1979.

- (1) That the Defendants sought derogatory comments from the people in the community about the Plaintiff or that the Defendants ordered other teacher aides to write derogatory comments about the Plaintiff.

8. There is no evidence before this Court or there is insufficient evidence before this Court which will warrant a finding of an appropriate amount of damages for the Plaintiff.

9. The evidence before the Court requires a finding, as a matter of law:

- (a) That age played no factor in the termination of the Plaintiff.
- (b) That alleged discrimination because of the filing of an EEOC charge played no part in the termination of the Plaintiff.
- (c) That alleged discrimination because of the filing of an EEOC charge and age played no part in the employment conditions of the Plaintiff.

10. The evidence before this Court requires a finding, as a matter of a law:

- (a) That Ms. [REDACTED] was not qualified to perform her job.
- (b) That Ms. [REDACTED] did not meet the legitimate expectations of her employer.

11. The evidence before this Court requires a finding, as a matter of law, that no link of any kind has been shown to exist between the filing of an EEOC charge based upon age discrimination by the Plaintiff and any subsequent actions taken by the Defendants.

12. The evidence before this Court requires a finding, as a matter of law, that the Defendants took none of the

actions alleged in number 7 above, and/or took none of the actions because of age or because of a retaliatory motive.

13. The evidence requires a finding, as a matter of law that the Plaintiff has failed to make a prima facie case of discrimination based upon age or retaliation.

IV.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Defendants pray that this Court grant Defendants' motion for a directed verdict, discharge the Jury and direct a verdict for the Defendants that Plaintiff take nothing from this suit, that it be dismissed with prejudice, that all costs of court be taxed against Plaintiff, and for such other and further relief, at law or in equity, to which these Defendants are justly entitled.

Respectfully submitted,

Bracewell & Patterson

By _____

Robert B. Watts,
Attorney-in-Charge
and
Timothy T. Cooper

Attorneys for the Defendants,
The _____ School
District and _____

127C3J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
[REDACTED] DIVISION

[REDACTED]	§	
	§	
Plaintiff	§	
	§	
VS.	§	C.A. No. [REDACTED]
	§	
[REDACTED] SCHOOL	§	
DISTRICT, ET AL.,	§	
	§	
Defendants	§	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE DEFENDANTS [REDACTED] SCHOOL DISTRICT,
[REDACTED]

A. FINDINGS OF FACT

1. The Defendants did not maintain an officially promulgated policy or a well-established custom of discriminating against persons on the basis of their race or gender in its Accident Prevention and Loss Control Department. As a result, the [REDACTED] School District [REDACTED] Board of Education (Board) could not have had knowledge or acceded to the continuation of such policy or custom.

2. The Plaintiff was not subject to disparate treatment from other similarly situated individuals within the Accident Prevention and Loss Control Department on the basis of her race or gender.

3. The Defendants did not purposefully and intentionally discriminate against the Plaintiff on the basis of her race or gender.

4. Discrimination on the basis of her race or gender was not the proximate cause for the recommendation to terminate the Plaintiff.

5. The Plaintiff was recommended for termination from employment at the [REDACTED] because of legitimate deficiencies in her work performance.

6. The Plaintiffs did not maintain a policy or custom of discriminatorily discharging or failing to promote female employees because of their refusal to submit to sexual advances of certain upper level male employees.

7. The Plaintiff did not obtain a right to sue letter from the United States Department of Justice before initiating her Title VII action.

8. [REDACTED] were not named as respondents in the Plaintiff's original EEOC charge.

9. Neither the Defendants nor its agents conspired with officials of a separate and distinct entity to deprive the Plaintiff of her constitutional rights.

B. CONCLUSIONS OF LAW

1. There is no evidence to support a finding that the [REDACTED] is liable under 42 U.S.C. §1983.

2. There is no evidence to support a finding that the [REDACTED] is liable under 42 U.S.C. §1985.

3. This court does not have jurisdiction over the Plaintiff's Title VII claim because the Plaintiff did not obtain a right to sue letter from the United States Department of Justice before initiating the Title VII action.

4. Even if the court had jurisdiction under Title VII, there is no evidence to support finding that the [REDACTED] is liable under Title VII.

5. Because the [REDACTED] did not maintain a policy or custom which deprived the Plaintiff of her constitutional rights, the Board of the [REDACTED] could not have possibly had actual or constructive knowledge of any policy or custom of discrimination.

6. There is no evidence to support a finding that the Plaintiff possessed any constitutionally protected right of which she was deprived by the actions of the Defendants.

7. Any actions taken by the Defendants were not sufficiently "egregious" to implicate the Plaintiff's constitutional rights under 42 U.S.C. §1983.

8. The Defendants did not purposefully and intentionally discriminate against the Plaintiff because of her race or gender.

9. The Plaintiff was not victimized by disparate treatment from similarly situated individuals within the Accident Prevention and Loss Control Department at the [REDACTED] on the basis of her race or gender.

10. [REDACTED] are not "employers" within the meaning of Title VII and not subject to Title VII liability.

11. [REDACTED] acted in good faith and did not violate any clearly-established constitutional rights of the Plaintiff.

12. Officials of the [REDACTED] did not conspire either among themselves or with officials at any other separate and distinct entity to deprive the Plaintiff of her constitutional rights.

13. Two or more agents of the HISD cannot "conspire" to deprive the Plaintiff of her rights under 42 U.S.C. §1985.

14. Because the Plaintiff did not essentially succeed on her claims on the merits in this lawsuit, she cannot be considered a "prevailing party" entitled to the recovery of attorneys' fees and court costs under 42 U.S.C. §1988.

15. The Defendants are entitled to costs, including attorneys' fees, under 42 U.S.C. §1988.

16. The Plaintiff will take nothing from the Defendants in this action.

17. Let judgment be entered accordingly.

SIGNED this ____ day of _____, 1985.

UNITED STATES DISTRICT JUDGE

36JJHSB